No. 89-369-CFX
Status: GRANTED

Title: General Motors Corporation, Petitioner
v.
United States

Docketed:
September 5, 1989

Court: United States Court of Appeals
for the First Circuit

See also:
89-1104

Counsel for petitioner: Garrett,Theodore L.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Sep 5 1989	G	Petition for writ of certiorari filed.
2	Sep 12 1989		Appendix of petitioner filed.
5	Oct 12 1989		Order extending time to file response to petition until November 11, 1989.
6	Nov 9 1989		Brief amicus curiae of Chamber of Commerce of the United States filed.
7	Nov 9 1989		Brief of respondent United States in opposition filed.
8	Nov 15 1989		DISTRIBUTED. December 1, 1989
9	Nov 17 1989	X	Reply brief of petitioner GMC filed.
10	Dec 4 1989		Petition GRANTED.
			**********
11	Jan 2 1990		Record filed.
		*	Certified copy of appendix and proceedings, 6 volumes, received.
12	Jan 18 1990		Brief amicus curiae of Dept. of Environmental Quality of State of Louisiana filed.
13	Jan 18 1990		Joint appendix filed.
14	Jan 18 1990		Brief amicus curiae of Chamber of Commerce of the United States filed.
15	Jan 18 1990		Brief amici curiae of National Governors' Assn., et al. filed.
16	Jan 18 1990		Brief of petitioner General Motors Corporation filed.
17	Jan 18 1990		Brief amicus curiae of Motor Vehicle Manufacturers Assn., et al. filed.
18	Jan 18 1990		Brief amicus curiae of Washington Legal Foundation filed.
19	Jan 18 1990		Brief amici curiae of Golden West Refining Co., et al. filed.
20	Jan 26 1990		SET FOR ARGUMENT WEDNESDAY, MARCH 21, 1990. (1ST CASE)
21	Feb 18 1990		Brief amicus curiae of Service Station Dealers of America filed.
22	Feb 20 1990		Brief of respondent United States filed.
23	Feb 20 1990		Lodging received.
24	Feb 20 1990		Record filed.
		*	Certified copy of original record received.
25	Feb 20 1990		Brief amici curiae of Massachusetts, et al. filed.
26	Feb 20 1990		Brief amicus curiae of Mid-America Legal Foundation filed.
27	Feb 27 1990		CIRCULATED.
28	Mar 14 1990	X	Reply brief of petitioner GMC filed.
29	Mar 21 1990		ARGUED.

89-369
No. 89-

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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September 1989

QUESTIONS PRESENTED

In 1985 the Commonwealth of Massachusetts revised its Clean Air Act implementation plan to provide an extension of time to 1987 for General Motors to comply with certain air regulations. Pursuant to a published EPA policy, the extension allowed GM time to build a new $200 million facility that achieved lower emissions than were otherwise required. EPA failed to approve or disapprove the Commonwealth's revision, and instead filed suit against GM seeking penalties for failure to meet the original deadline. The questions presented are:

1. Where EPA has failed to act on a revision to a state plan within four months, as required by the Clean Air Act, may the government bring an action for civil penalties against a company that is in compliance with the revised plan?

2. Whether the decision below undermines the ability of states to make ongoing policy choices as to air pollution control measures, and creates disincentives for even-handed administration of the Act?

3. Whether the decision below is contrary to the language and intent of Congress and decisions of this Court and other circuit courts?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Statutory Background	3
B. The Massachusetts SIP Revision	5
C. The Proceedings Below	6
REASONS FOR GRANTING THE WRIT	8
I. THE DECISION BELOW CREATES A CONFLICT IN THE CIRCUITS	9
II. THIS CASE PRESENTS MAJOR ISSUES OF FEDERALISM, COMITY AND THE IMPLEMENTATION OF THE CLEAN AIR ACT	12
III. THE ISSUE PRESENTED INVOLVES IMPORTANT, RECURRING QUESTIONS CONCERNING ENFORCEMENT UNDER THE CLEAN AIR ACT	15
CONCLUSION	18
APPENDIX	1a

TABLE OF AUTHORITIES

Cases — Page

American Cyanamid Co. v. *EPA*, 810 F.2d 493 (5th Cir. 1987) ..... *passim*

Bethlehem Steel Corp. v. *EPA*,782 F.2d 645 (7th Cir. 1986) 3,14

Connecticut v. *EPA*, 696 F.2d 147 (2d Cir. 1982) 3

Council of Commuter Orgs. v. *Thomas* 799 F.2d 879 (2d Cir. 1986) 13

Duquesne Light Co. v. *EPA*, 698 F.2d 456 (D.C. Cir. 1983) 10,13

Indiana & Michigan Elec. Co. v. *EPA* 733 F.2d 489 (7th Cir. 1984) 14

Sierra Club v. *Indiana-Kentucky Elec. Corp.*, 716 F.2d 1145 (7th Cir. 1983) 16-17

Train v. *Natural Resources Defense Council*, 421 U.S. 60 (1975) 4,13,14

United States v. *General Motors Corp.*, No. 87-2068 (D. Mass. May 16, 1988) 6,7,14,15

United States v. *General Motors Corp.*, 876 F.2d 1060 (1st Cir. 1989) 1,7-9

Statutes

28 U.S.C. § 1254(l)(1982) 2

42 U.S.C. § 7407(a)(1982) 4

42 U.S.C. § 7409(1982) 3

42 U.S.C. § 7410(1982) 3

42 U.S.C. § 7410(a)(2)(1982) 2,4,13

42 U.S.C. § 7410(a)(3)(1982) 2,4,13

42 U.S.C. § 7502(a)(2)(1982) 5

Table of Authorities Continued

	Page
Administrative Actions	
46 Fed. Reg. 51,386 (1981)	5
53 Fed. Reg. 36,011 (1988)	17
310 CMR 7.18(7)	5

IN THE

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OCTOBER TERM, 1989

No. 89-

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner General Motors Corporation[1] prays that a writ of *certiorari* issued to review the opinion and judgment of the United States Court of Appeals for the First Circuit in this case.

Opinion Below

The opinion of the Court of Appeals is reported at 876 F.2d 1060, and is reprinted in the Appendix to this petition at 1a.

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[1] Subsidiaries and affiliates of General Motors are set forth in the Appendix at 19a pursuant to Rule 28.1.

Jurisdiction

The decision below was rendered on June 7, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

Statutes And Regulations Involved

This case involves a Clean Air Act enforcement action by the Environmental Protection Agency (EPA) against General Motors. Under the Act, EPA is required within four months to approve or disapprove revisions to State Implementation Plans (SIPs). 42 U.S.C. § 7410(a)(2), (3) (1982). The principal issue in this case is whether EPA's failure to do so prevents it from enforcing the prior state plan.

STATEMENT OF THE CASE

The questions presented in this case raise fundamental issues concerning the appropriate division of authority between the federal government and the states in the establishment and implementation of State Implementation Plans under the Clean Air Act. The Clean Air Act requires EPA to act promptly, within four months, either to approve or disapprove a revised SIP. EPA's refusal to take timely action on a SIP revision by a state, and EPA's decision instead to enforce the old SIP, unlawfully interferes with the state's right to select the regulatory alternative it will use to attain federal standards. Because of this fundamental infringement of state prerogatives, the Fifth Circuit held in a similar case that EPA may not collect penalties under the old SIP. *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (5th Cir. 1987).

Expressly disagreeing with the Fifth Circuit's approach in the *Cyanamid* case, the court below held that EPA may bring an enforcement action against General Motors despite EPA's failure to act on a SIP revision in a timely manner. The First Circuit acknowledged that Congress did not intend the states' legitimate policy choices to be held hostage to EPA's schedule. Without citing any concrete factual or legal basis for its conclusion, the First Circuit held that an enforcement bar is too drastic a remedy. GM's position would in fact not bar federal enforcement, but would simply require EPA to take prompt action on SIP revisions as required by law—a matter wholly within EPA's ability to control. The decision below creates a conflict in the circuits and raises important and recurring issues concerning the enforcement of the Clean Air Act.

A. Statutory Background

The Clean Air Act was designed to create a partnership between the federal government and the states in the regulation of air pollution.[2] Under the statute, the basic division of authority is straight forward: the federal government, through EPA, establishes national air quality goals, called the National Ambient Air Quality Standards. 42 U.S.C. § 7409 (1982). Each state then has the responsibility for establishing and administering a State Implementation Plan that will achieve those standards within its boundaries. 42 U.S.C. § 7410 (1982).

The statute emphasizes that "[e]ach state shall have the primary responsibility for assuring air quality

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[2] Bethlehem Steel Corp. v. EPA, 782 F.2d 645, 647 (7th Cir. 1986); Connecticut v. EPA, 696 F.2d 147, 151 (2d Cir. 1982).

within the entire geographic area comprising such [s]tate. . . ." 42 U.S.C. § 7407(a) (1982). The Act gives each state the freedom to design its SIP as it chooses, selecting whatever mix of regulatory requirements it believes will best attain the national standards in a manner consistent with the state's political, economic and social policy concerns. The statute requires EPA review and approval of a SIP before it comes into force. However, so long as a SIP meets the basic statutory requirements, EPA *must* approve it. *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 79 (1975).

Congress anticipated that the design and administration of appropriate SIPs would be an ongoing process for the states. The statute therefore permits the states to amend their SIPs from time to time as they deem appropriate and requires EPA to approve and enforce the amended SIPs so long as they meet the minimum statutory requirements. When a SIP is promulgated or revised, EPA is required to approve or disapprove it within four months. 42 U.S.C. § 7410(a)(2), (3). This four-month deadline requires EPA to render a final decision in a timely fashion, so that the state may proceed to administer and enforce its plan with minimal disruption and confusion. In this case, EPA left the Commonwealth of Massachusetts, General Motors, and the public in a state of uncertainty over the validity of a proposed revision for nearly three years.[3]

[3] Long after the deadline expired, EPA in September 1988 published its final action on the day its brief was filed in the First Circuit. *See* note 11 below. GM has challenged EPA's action in a separate suit in the First Circuit.

B. The Massachusetts SIP Revision

General Motors owns and operates an automobile assembly plant in Framingham, Massachusetts. The plant has associated with it a paint shop that is the source of volatile organic compounds (VOCs). In 1979, the Commonwealth promulgated SIP regulations establishing limits on VOC emissions from automobile surface coating or painting operations. As originally promulgated, the regulation required full compliance by December 31, 1985.[4] This date in the SIP was two years earlier than the Clean Air Act's final 1987 compliance deadline. 42 U.S.C. § 7502(a)(2) (1982).

On October 20, 1981, EPA published a policy statement advocating deferral of the compliance dates in SIPs for automobile paint operations. 46 Fed. Reg. 51,386 (1981). The policy statement noted that the industry was developing new lower-emission techniques, such as basecoat/clearcoat technology, and that allowing a deferral of compliance to 1986 or 1987 would give the industry needed time to develop more cost-effective technology. *Id.* at 51,387. Pursuant to this policy, General Motors submitted a timely request for an extension of the deadline to the Commonwealth.[5] Following a public hearing, the Commonwealth revised the SIP regulation for automobile painting to extend the applicable deadline to August 31, 1987, a 20-month extension but still several

[4] In particular, 310 CMR 7.18(7) limits emissions from automobile surface coating, which includes "top coat" and "final repair" painting operations, the final steps in painting a new automobile.

[5] At the public hearing, an EPA representative expressed reservations but did not oppose the proposed revision.

months short of the final Clean Air Act deadline. The revised SIP was submitted by the Commonwealth to EPA for approval on December 30, 1985.

In reliance on the Commonwealth's action, General Motors continued to operate its then-existing paint facility during the 20-month extension. General Motors proceeded with its state-approved compliance strategy, spending over $200 million to construct a new lower-emitting paint facility using the basecoat/clearcoat system. The old Framingham paint facility was permanently shut down on July 7, 1987, more than a month before the Commonwealth's revised deadline.

During the entire period of the extension provided by the Commonwealth's revised SIP regulations, EPA failed to take final action to approve or disapprove the proposed revision. The initial deadline and the revised deadline both came and went. Instead of taking action on the SIP revision, the government proceeded to enforce the December 1985 deadline in the original SIP. On August 17, 1987, the United States filed a complaint in federal district court in Massachusetts seeking civil penalties for the violation of the 1985 deadline. The complaint made no mention of the company's compliance plan, of which EPA was fully aware, or of the state's revision of the SIP regulation to defer compliance to August 31, 1987. It also failed to mention that, despite the passage of nearly two years, EPA had still not taken final action on the SIP revision.

C. The Proceedings Below

On May 16, 1988, the District Court (McNaught, J.) granted summary judgment to General Motors.

United States v. *General Motors Corp.*, No. 87-2068 (D. Mass. 1982). The court held that the Clean Air Act required EPA to act on the Commonwealth's proposed SIP revision within four months, and that, having failed to do so, EPA was barred from enforcing the old SIP. Because in this case EPA had not made a final decision on the Commonwealth's SIP revision, the court held that fines could not be assessed and consequently that the Agency's enforcement action should be dismissed.

The District Court believed this rule was necessary to ensure that EPA did not simply pocket veto SIP revisions and thereby paralyze state regulatory processes once the initial SIPs were in place. Barring the Agency from enforcing an existing SIP until it ruled on proposed revisions was necessary, in the District Court's view, to provide EPA with sufficient incentive to conclude its review within the statutory four-month period. Noting that "EPA always holds the ultimate trump card" because it may at any time take final action on a SIP revision and begin enforcement proceedings, the District Court believed that barring enforcement struck the appropriate balance under the Act. Slip Op. at 7. The District Court expressly followed the decision of the Court of Appeals in *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (5th Cir. 1987).

The United States appealed the dismissal of its enforcement action. On June 7, 1989, the First Circuit entered its opinion (Coffin, J.) and judgment *reversing* the District Court's decision. *United States* v. *General Motors*, 876 F.2d 1060 (1st Cir. 1989). The Court of Appeals agreed with the District Court that EPA must complete its evaluation of SIP revisions within

four months. The First Circuit expressly declined, however, to follow the Fifth Circuit's rule in *American Cyanamid Co., supra*. Without citing any factual support, the First Circuit assumed that EPA would need longer than four months to act on SIPs even with the incentive of an enforcement bar, even though that assumption is contrary to the statute. The Court concluded that the additional incentive provided by the Fifth Circuit's rule is not outweighed by the harm done to the general public by prohibiting enforcement actions in cases where EPA fails to meet its deadline. 876 F.2d at 1067. The Court did not elaborate on the nature of this "harm" or explain why this "balancing" of policies should overcome the specific direction of Congress that EPA act promptly on SIP revisions.

The First Circuit acknowledged that GM had raised a number of issues concerning the equities of this case. In particular, the court noted that GM had relied on EPA's 1981 policy statement in deciding to convert its plant to BC/CC technology, and that the public was not harmed because the present system was environmentally superior. The First Circuit declined to comment on these issues, stating instead that GM is free to raise them before the District Court. The decision below states that the District Court has the responsibility for determining the amount of penalties to assess, and that the trial court may consider the reasonableness of the Agency's delay and the prejudice suffered by the company as a result. *Id.* at 1067-68.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for *certiorari* in this case for three reasons that the Court has traditionally deemed to warrant plenary review. First, this case presents major issues of federalism, comity, and the implementation of the Clean Air Act. Second, the decision below creates a conflict in the circuits and is contrary to the language and policies of the Clean Air Act. Third, the decision below involves recurring questions of nationwide importance concerning the enforcement of state plans under the Clean Air Act.

I. THE DECISION BELOW CREATES A CONFLICT IN THE CIRCUITS

The primary issue addressed by the First Circuit was whether, having failed to complete its review of a state's SIP revision within four months, EPA is barred from enforcing the old SIP. The First Circuit expressly declined to follow the decision in *American Cyanamid*, holding instead that EPA may bring an enforcement action, but that the District Court could take into account the Agency's delay in deciding the amount of penalties to assess. 876 F.2d at 1067-68.

In *American Cyanamid*, the State of Louisiana had submitted a revision to its SIP concerning the manner in which a company could demonstrate compliance with certain emission limitations. EPA did not act to approve or disapprove the revision. Long after the SIP revision was proposed, however, EPA initiated an enforcement action against American Cyanamid, charging it with violations of the old SIP requirements. The Fifth Circuit held that EPA was barred from enforcement under these circumstances, emphasizing the need to give EPA an incentive to respect the four-month rule.[6] The court held that permitting

[6] In reaching this result, *American Cyanamid* discussed at

EPA to benefit from its own inaction was impermissible in light of the resulting infringement of the state's right to timely consideration of its SIP revision. 810 F.2d at 500. EPA's distortion of the federal-state partnership created under the Act was of particular concern to the court:

> Where, as here, the state has proposed a revision to its SIP which clearly authorizes local businesses to act in accordance with it without running afoul of the Clean Air Act, *the interest of the state itself is deeply involved in the required four month approval or disapproval of the proposed revision.* It distorts the statutory scheme to place virtually full emphasis upon the business entity involved as a charged 'polluter.' The emphasis of the statute, rather, is upon the important role which the state plays in defining authorized emissions . . . . The issue then is not so much pollution by American Cyanamid but the *default of the EPA in carrying out the congressional intent to work in close co-*

length the contrary approach adopted by the D.C. Circuit in Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983). In that case, the D.C. Circuit also held that EPA could not assess penalties for violation of an old SIP where it had failed to act within four months on a SIP revision. *Id.* at 471. The court found that assessment in such circumstances constituted an "inequitable use of the penalty powers." *Id.* at 472. The court suggested, however, that it might be permissible for the Agency to assess such penalties retroactively after it finally completed its review of the revision if it ultimately decided to disapprove it. To the extent that the *Duquesne* approach differs from both the *Cyanamid* and *General Motors* decisions, there is a "three-way" conflict in the circuits.

> *operation with the states* in implementing standards and enforcing the Clean Air Act. *We emphasize the importance of the EPA acting, not for the benefit of American Cyanamid, but for the benefit of the State of Louisiana . . . .*"

Id. (Emphasis added).

Moreover, the court expressed concern that failure to bar enforcement "may encourage the EPA to reject [SIP] revisions that it should accept." *Id.* at 499. As a practical matter, after such a long delay, and after initiating an enforcement proceeding, "EPA might be reluctant to approve Louisiana's revision and admit that American Cyanamid is not liable for noncompliance after all." *Id.* The court found that the disincentives raised by such a situation could endanger "EPA's even-handed administration of the Act." *Id.* This concern is starkly raised in the present case.[7]

The decision below thus creates an intolerable conflict among the circuits on an issue of fundamental importance. Moreover, it is contrary to the Clean Air Act because it gives the Agency little or no incentive to conclude its review of SIP revisions within the statutory time limit because, no matter how long the

[7] In this case, EPA's final disapproval was not issued until after the old paint shop was closed and a new $200 million paint shop had been built to comply with the revised SIP. The revision had then become irrelevant to anything other than the dismissed enforcement action. EPA had every incentive to disapprove the revision and no reason, from a regulatory standpoint, to determine properly whether that decision was correct on the merits. In this context, EPA's even-handed evaluation of the revision is particularly open to question.

Agency procrastinates, it knows that it may collect full penalties if the revision is ultimately rejected. *American Cyanamid*, 810 F.2d at 499.

The correct view, adopted by the Fifth Circuit in the *American Cyanamid* case, *supra*, is that enforcement under such circumstances is indeed barred. Contrary to the suggestion by the First Circuit, a bar of enforcement is not a drastic restriction of EPA's enforcement authority. Instead, it is a limited, carefully tailored rule providing simply that EPA, which basically has the power to act on a SIP revision at any time it chooses, may not bring an enforcement action under an old SIP until it has acted to approve or disapprove a SIP revision. Under this rule, the resulting bar on enforcement is one that EPA has created for itself.

II. THIS CASE PRESENTS MAJOR ISSUES OF FEDERALISM, COMITY AND THE IMPLEMENTATION OF THE CLEAN AIR ACT.

The Clean Air Act is a federal-state partnership in which the states have the primary role in establishing emission limitations. In order to assure that state prerogatives are given full effect, Congress has carefully circumscribed EPA's ability to interfere with a state's SIP by limiting the grounds on which EPA may decline to approve a SIP. This division of responsibility under the Act was highlighted by this Court in *Train* v. *NRDC*, *supra*:

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met . . . The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of Section 110(a)(2) . . . ."

421 U.S. at 79.

Congress did not want or intend SIPs to be carved into stone. It therefore empowered the states to promulgate SIP revisions, under § 110(a)(3) of the Clean Air Act, 42 U.S.C. § 7410(a)(3), with the same general oversight by EPA that existed for the original SIPs. Congress intended the expeditious approval of SIP revisions to be as important as the approval of original SIPs. The states' role in the administration of the Clean Air Act is a continuing one, and that role would be substantially jeopardized if EPA were permitted to ignore proposed SIP revisions for an extended period of time. For that reason, EPA is required to approve or disapprove original SIPs and SIP revisions within four months. 42 U.S.C. § 7410(a)(2), (3).[8]

To allow EPA to ignore proposed SIP revisions for an extended period of time would frustrate the purposes of the statute. As this Court stated in discussing § 110(a)(3) in *Train* v. *NRDC*, *supra*:

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[8] *See* Duquesne Light Co. v. EPA, 698 F.2d 456, 471 (D.C. Cir. 1983); American Cyanamid Co., *supra*, 810 F.2d at 495; Council of Commuter Orgs. v. Thomas, 799 F.2d 879, 888 (2d Cir. 1986).

> Far from evincing congressional intent that the Agency assume control of a [s]tate's emission limitations mix once its initial plan is approved, the revision section is to all appearances the mechanism by which the states may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards.

421 U.S. at 80.

Without a requirement of timely consideration of SIP revisions, EPA would, in essence, be permitted to appropriate to itself a state's right to choose among regulatory alternatives: if EPA prefers the revised SIP, it can approve it; where if it prefers the SIP in its original form, it can simply ignore the proposed revision or delay final action on the revision indefinitely while it enforces the old SIP.[9]

Important state interests are affected by EPA's failure to complete its review of a SIP revision in a timely manner. As the District Court noted:

> For an indefinite period, the state would be unable to act to balance the dictated national priorities with the interest of its citizens and industries as the Clean Air Act intended. And the industries themselves, though fully in compliance with state law, would in some instances face the Scylla and Charybdis choice between ceasing operations now, or possibly being forced out of business by heavy fines later.

United States v. *General Motors Corp.*, No. 87-2068 (D. Mass. May 16, 1988) Slip Op. at 7-8.

[9] Bethlehem Steel Corp. v. EPA, 782 F.2d 645, 650 (7th Cir. 1986). The courts have uniformly invalidated EPA attempts to interfere with a state's regulatory decision under the Act in this fashion. *See also* Indiana & Michigan Elec. Co. v. EPA, 733 F.2d 489, 492 (7th Cir. 1984).

The decision of the First Circuit provides EPA with little incentive to take timely action on SIP revisions. The approach adopted by the First Circuit results in precisely the type of unilateral federal regulation that the statute was designed to avoid. In effect, the Court of Appeals has given EPA a right—previously rejected by the court in *American Cyanamid*—to accomplish a "pocket veto" of a SIP revision by failing to take final action.

III. THE ISSUE PRESENTED INVOLVES IMPORTANT, RECURRING QUESTIONS CONCERNING ENFORCEMENT UNDER THE CLEAN AIR ACT.

In a program as important and complex as the Clean Air Act, it is vital that all parties involved understand the means by which SIP plans and plan revisions may be subject to enforcement. The decision below raises a host of problems concerning the proper balance between State and federal prerogatives under the statute. As a result of the conflict in the circuits on this important issue, the thousands of industrial facilities throughout the country that are subject to SIP requirements can have no certainty as to the enforceability of SIP provisions which have been superseded by state revisions to the plans.[10]

[10] In 1987, EPA processed 56 SIP revisions in Region I, one of 10 EPA Regions, according to EPA data presented to the

As discussed above, states must continually revise their SIP regulations in order to insure attainment of the national standards. Prompt action by EPA on SIP revisions is essential to allow the states to continue with their regulatory planning and implementation, and to enable industry to plan and construct necessary control equipment. EPA's failure to act promptly places the states and industry in limbo, with no guidance as to how to proceed. The decision of the First Circuit encourages EPA to be dilatory in reviewing revised state plans, and frustrates state and industry efforts to take appropriate and cost-effective steps toward attainment of the nation's air quality goals.

EPA's failure to take timely action on a revised SIP creates an anomaly in enforcement. A revised SIP is a revision in state regulations which amends state law; once adopted the state may enforce only the revised SIP. Under the First Circuit's approach, EPA may enforce the old SIP, regardless of whether a violation exists under the revised SIP. We submit that it is absurd to suggest that Congress intended that a Clean Air Act SIP, the product of a joint federal and state effort under the Clean Air Act, would be enforceable in federal courts but not state courts. *See Sierra Club* v. *Indiana-Kentucky Elec. Corp.*, 716 F.2d 1145, 1151 (7th Cir. 1983). The four-month deadline for the review of SIP revisions was plainly designed to eliminate this anomaly. Because the decision below does not give due regard to the

District Court. One-fourth of the EPA Region I enforcement actions from 1985-88 involved cases where a revised SIP was being developed or had been submitted.

appropriate role of the states under the Clean Air Act, the mandate of Congress has been thwarted.

Moreover, allowing enforcement to proceed in the absence of final action on a SIP calls into severe question the even-handedness of the SIP review process itself. As the *American Cyanamid* court pointed out, it will be difficult, if not impossible, for EPA to review a SIP revision objectively when it has already initiated an enforcement proceeding. Failure to bar enforcement "may encourage the EPA to reject [SIP] revisions that it should accept." 810 F.2d at 499.

The disincentives created by such a situation are certain to endanger EPA's even-handed administration of the Act. This concern is particularly strong in the present General Motors case. On the very same day that its opening brief was served in the First Circuit, and more than two years after the Commonwealth of Massachusetts had submitted its SIP revision, EPA published a determination disapproving the SIP revision.[11] The only possible purpose of the belated EPA action was to serve as a last-minute attempt to bolster the government's position on appeal. It is clear that EPA viewed its regulatory and enforcement decisions as part of a single, combined strategy in which enforcement would be given priority. Under those circumstances, objective review of the SIP revision became a practical impossibility.

It is also significant to note that EPA's delay in this case, and in the *American Cyanamid* case, involves situations where the companies were attempting to implement programs that *benefit* the

[11] 53 Fed. Reg. 36,011 (1988).

environment. In the present case, for example, the long-term emissions from General Motor's Framingham plant were reduced through the construction of a new paint facility that has substantially lower emissions than the old one was required to attain under the Commonwealth's rules. In reliance on EPA's 1981 policy, and with the Commonwealth's concurrence, General Motors, spent $200 million to build the new, lower emitting basecoat/clearcoat paint shop. General Motors continued to operate its old lacquer paint shop until July 1987, when the old facilities were permanently shut down. General Motors was highly prejudiced by EPA's actions in this case, and similar cases are certain to arise repeatedly in the future.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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September 1989

APPENDIX

APPENDICES

Page

APPENDIX A

United States v. General Motors Corporation, No. 88-1799 (1st Cir. June 7, 1989) ... 1a

APPENDIX B

List of Subsidiaries and Affiliates of General Motors Corporation 19a

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1799.

UNITED STATES OF AMERICA
Plaintiff, Appellant,

v.

GENERAL MOTORS CORPORATION
Defendant, Appellee.

JUDGMENT

Entered: June 7, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is reversed and the cause is remanded to the District Court for further proceedings not inconsistent with the opinion filed this date.

By the Court:

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Clerk.

[cc: Messrs. Shilton, Garrett and Ms. McCabe]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1799

UNITED STATES OF AMERICA,
Plaintiff, Appellant,

v.

GENERAL MOTORS CORPORATION,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. John J. McNaught, *U.S. District Judge*]

Before
Campbell, *Chief Judge*,
Coffin and Torruella, *Circuit Judges*.

David C. Shilton, Land and Natural Resources Division, Department of Justice, with whom *Roger J. Marzulla*, Assistant Attorney General, *Richard J. Leon*, Deputy Assistant Attorney General, *Jaques B. Gelin* and *William D. Brighton*, Land and Natural Resources Division, Department of Justice, were on brief for the United States.

Theodore L. Garrett with whom *Sonya D. Winner, Covington & Burling, Kenneth A. Reich, Widett, Slater & Goldman*, and *Patrick J. McCarroll* were on brief for appellee.

Janet G. McCabe, Environmental Protection Division, Department of the Attorney General, and *Lee P. Breckenridge*,

Chief, Environmental Protection Division, on brief for the Commonwealth of Massachusetts, Amicus Curiae.

JUNE 7, 1989

COFFIN, *Circuit Judge*. This is an appeal by the Environmental Protection Agency (EPA) from the district court's dismissal of its enforcement action under the Clean Air Act, 42 U.S.C. § 7401 *et. seq.*, against appellee General Motors. The case requires us to answer two statutory questions. First, does the four-month time limit for EPA action on original state implementation plans (SIPs) also apply to the Agency's review of proposed revisions to existing state plans. Second, assuming the EPA must complete its review of SIP revisions within four months, does its failure to do so prevent it from enforcing an existing state implementation plan during the interval between the end of the four-month period and the time the agency finally rules on the revision.

I.

The Clean Air Act

During the 1950s and 1960s, the responsibility for improving the nation's air quality fell to the states, with the federal government playing only a minor role. Over the years, however, there was growing dissatisfaction with the states' effort to combat air pollution. Congress responded with the 1970 Amendments to the Clean Air Act (the Act). Although the Amendments greatly increased the federal government's role, they by no means eliminated the states' responsibility for improving air quality. To the contrary, the Act expressly preserved the principle "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments. . . ." § 101(a)(3) 42 U.S.C. § 7401(a) (3) *See Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 64 (1975). Thus, the states and the federal government were now to be partners in the continuing fight against air pollution.

The division of responsibility is straightforward and logical. The EPA, the federal agency charged with administering the Act, has the task of establishing National Ambient Air Quality Standards (NAAQS). The states then have the responsibility of submitting for EPA approval state implementation plans (SIPs) designed to achieve and maintain these uniform standards. § 110(a)(1). By giving the EPA authority to set threshold standards and to reject implementation plans that are ill-designed to achieve and maintain such standards, Congress ensured that states could not compete unfairly for industry by offering lenient air requirements. *See Duquesne Light* v. *EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983); *United States* v. *Ford Motor Co.*, 814 F.2d 1099, 1102 (6th Cir. 1987). At the same time, however, Congress believed it important that the states retain wide latitude in choosing how best to achieve national standards, given local needs and conditions. The EPA, therefore, may not reject a SIP unless it finds that the plan fails to satisfy the substantive requirements set out in the Act, the principal one of which is that the plan be designed to attain national standards as quickly as practicable. § 110 (a)(2)(A)-(K). "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train*, 421 U.S. at 79.

Congress also recognized that, because of advances in technology and changing local conditions, states would occasionally wish to revise their original implementation plans. The EPA may reject these SIP revisions, but its authority to do so is no greater than its authority to reject an original SIP. A state's proposed revision must be approved, therefore, unless it fails to satisfy one of the requirements set out in § 110(a) (2) governing the evaluation of original SIPs. § 110(a) (3) (A).

Once an original or revised SIP is approved by the EPA, it becomes federal law and is enforceable in one of two ways.

Under either method, the first step is for the EPA to issue a Notice of Noncompliance. If the violation continues and the EPA cannot through negotiations reach some agreement with the polluting source, the Agency may enforce the SIP either by issuing an administrative order under § 120 or by instituting an enforcement action under § 113, which provides for injunctive relief as well as for civil penalties of up to $25,000 per day. Criminal penalties for knowing violations are also authorized. § 113(c).

Under § 120, the administrative mechanism, fines begin to accrue upon the issuance of a Notice of Noncompliance and are intended to offset the economic benefit to the company of delaying compliance. *See Duquesne Light*, 698 F.2d at 464. Under § 113, the mechanism employed in this case, the EPA must bring an enforcement action in the district court to collect penalties. The court is given the responsibility of determining the amount of penalties to assess, taking into consideration such factors as the seriousness of the violation and the economic impact of the penalty on the business. § 113(b).

Given the sense of urgency with which the 1970 Amendments were passed, it is not surprising that Congress did not leave the states and EPA free to work at their own pace in accomplishing these tasks. The Act is laced with deadlines applicable to both the states and the Agency. Of concern to us here are the deadlines for EPA review of state implementation plans. It is undisputed that the EPA must complete its review of original SIPs within four months. § 110(a) (2) ("The Administrator shall, within four months . . . , approve or disapprove [original SIPs]"). Unlike § 110(a) (2) however, § 110(a) (3) (A) which governs EPA review of SIP revisions, does not contain language explicitly imposing a four-month deadline on the Agency. Whether Congress nevertheless intended for the Agency to complete its review of SIP revisions within four months is the question giving rise to the instant dispute.

The Massachusetts SIPs

General Motors owns and operates an automobile assembly plant in Framingham, Massachusetts. The plant's painting operation is the source of volatile organic compounds (VOCs) which contribute to ozone. In 1980, the EPA approved a Massachusetts SIP governing VOC emissions from automobile painting operations. The plan permitted GM, which operates the only automobile assembly plant in the state, to meet emission limits in stages, but required full compliance by December 31, 1985.

In 1981, the EPA published a policy statement in which it noted that advancing technology now made it practicable for automobile painting operations to switch from lacquer paints to lower-emitting basecoat/clearcoat enamel systems (BC/CC). In light of these developments, the Agency stated that it would be willing to approve SIP revisions deferring compliance with emissions limits until 1986 or 1987 for companies wishing to switch to the BC/CC system. Although GM's Framingham plant used lacquer paints, the company took no immediate action in response to the EPA's offer. GM did request revisions, however, for three of its assembly plants in other states within ten days of the EPA's statement.

Three years later, in November of 1984, GM decided that it now wished to defer the December 31, 1985, compliance date imposed by the existing Massachusetts SIP. The proposed revision it submitted to the Commonwealth did not call, however, for a conversion to BC/CC technology, but rather requested a deferral to give the company additional time to install emission controls on its existing lacquer coating lines. In June of 1985, GM changed course and finally proposed converting the Framingham plant to BC/CC by the summer of 1987, which would give it an additional 20 months to meet the final emission limits. The Commonwealth approved the revision and submitted the proposal to the EPA

on December 30, 1985—one day before the existing SIP's final compliance deadline.

The Enforcement Proceedings

Rather than wait for EPA approval of its proposed revision, GM began construction on a new BC/CC painting facility while at the same time continuing to operate its lacquer plant. EPA Region I, the branch of the Agency responsible for evaluating SIP revisions from New England states, began reviewing the proposal while also entering into negotiations with the Commonwealth and GM in the hope of resolving GM's noncompliance with the existing SIP's deadline by means of a delayed compliance schedule.[1]

On July 2, 1986, with negotiations apparently having failed, Region I sent to EPA headquarters a proposal to disapprove the revision. On August 14, 1986, EPA issued a Notice of Violation to GM concerning violations of the existing SIP by the company's lacquer plant— a prerequisite to the bringing of an enforcement action. Later that year, on December 2, EPA published a proposed disapproval of the Commonwealth's SIP revision based on Region I's July 2 evaluation. The proposed disapproval explained in detail why the Agency was considering rejecting the revision and invited public comment.

The feedback EPA received apparently did not convince Region I that its initial view had been misguided and on June 30, 1987, it recommended to EPA Headquarters that the proposed revision be rejected. Roughly two months later, on August 17, the EPA brought this enforcement action against GM under § 113 of the Act for alleged violations of

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[1] GM contends that to this date there has been no finding that its lacquer plant failed to comply with the existing SIP's December 31, 1985, deadline. The EPA finds this statement "incredible," pointing to the district court's opinion below as well as to an affidavit by one of the company's own engineers. If GM's continuing operation of its lacquer plant did not in fact violate the existing SIP, we are curious as to why the company is so concerned with the EPA's attempts to enforce the regulation.

the existing SIP's 1985 deadline. It was not until over a year later, on September 4, 1988, that the Agency made its final decision to reject the revision. By that time, the district court had dismissed EPA's enforcement action and GM had closed its lacquer plant in favor of its recently completed basecoat/clearcoat facility, which GM points out was in operation well before the August 1987 deadline set by the rejected SIP revision.[2] The Agency's decision was published on September 16, 1988, the day briefs were filed in this court.

The District Court's Decision

The district court began by construing § 110(a) (3) (A) of the Act to impose a four-month time limit on EPA review of SIP revisions. Noting that the Agency still had not made a final decision on the Commonwealth's SIP revision, the court went on to address the consequences of EPA's failure to meet the four-month deadline. After examining the Act's structure and purposes, the court concluded that if the Agency failed to complete its review within four months, it was barred from enforcing the existing SIP during the interval between the end of the four-month period and the time EPA finally acts on the revision. Because the EPA had not issued a Notice of Noncompliance until well after the four-month period had lapsed and had yet to make a final decision on the Commonwealth's SIP revision, the court held that fines could not be assessed, and consequently, that the Agency's enforcement action should be dismissed.

The court believed this rule necessary to ensure that the EPA did not sit on SIP revisions and thereby exclude the states from the regulatory process once the initial SIPs were in place. Barring the Agency from enforcing an existing SIP until it ruled on proposed revisions would, in the court's

[2] The EPA's complaint initially sought both injunctive relief and civil penalties. After learning that GM had shut down its lacquer plant, the Agency abandoned its claim for injunctive relief.

view, provide the EPA with sufficient incentive to conclude its review within the four-month period. The court recognized that the Act's primary purpose was to improve the nation's air quality. I concluded, however, that the public need not suffer under this rule because the "EPA always holds the ultimate trump card . . . [and] may at any time during or after the allowed four month period reject the proposal and invoke enforcement proceedings under the original SIP." In the court's view, then, its rule struck the appropriate balance under the Act, preserving the states' ability to tailor regulatory standards to their local needs, while at the same time allowing the EPA to continue protecting the public.

II

The threshold question is whether the Act imposes a four-month deadline on EPA review of SIP revisions. It is undisputed that the Agency must complete its evaluation of original SIPs within four months. Section 110(a) (2) which applies to original SIPs, states:

> The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan . . . if he determines that it was adopted after reasonable notice and hearing and that [it satisfies the substantive requirements specified in subparagraphs (A) -(K)].

Section 110(a) (3) (A), which governs EPA review of SIP revisions, does not contain this four-month language:

> The Administrator shall approve any revision of an implementation plan . . . if he determines that it meets the requirements of paragraph (2) [§ 110(a)(2)] and has been adopted by the State after reasonable notice and public hearings.

GM contends, however, that the reference to § 110(a) (2) was intended to incorporate both the substantive and procedural

requirements of that provision. The Commonwealth, in its capacity as amicus, agrees with this reading of the Act. The EPA, on the other hand, argues that the word "it" in § 110(a)(3)(A) clearly refers to the SIP revision, and not the Administrator, and therefore, that § 110(a)(3)(A) can fairly be read to incorporate only paragraph two's substantive standards and not the four-month rule as well.

Both sides further contend that the Act's structure and legislative history support their interpretation. GM stresses that while the fundamental purpose of the Act is to improve the nation's air quality, Congress made it clear that the states were to play an integral and continuing role in determining how best to achieve this goal. That the states' local interests, economic and otherwise, were to be considered in devising the regulatory framework is evident from Congress' decision to limit the EPA's discretion to reject a state plan. That the states' role was not to decrease after the initial regulatory framework was in place is clear from the fact that Congress not only provided the states with a means of revising their original plans, but also by the fact that the Act gives the Agency no more discretion to reject a SIP revision than to reject an original SIP.

GM claims that by taking nearly three years to issue a final decision, as it did in this case, the EPA has given itself what amounts to a "pocket veto" over SIP revisions, allowing it to frustrate the states' developing policy choices for no reason or any reason, a power the Agency clearly does not have under the Act. Moreover, it adds, without prompt action by the Agency, companies are left in limbo, unable to plan their future activities with any certainty. In this case, GM says it was forced to choose between continuing to operate a technologically outdated system or beginning construction on a new, lower-emitting plant, risking EPA disapproval down the line.

The EPA does not dispute that the Act contemplates continuing participation by the states. It argues, however, that

a four-month deadline is unnecessary to ensure this ongoing participation. As long as the Agency is under a general duty to act without unreasonable delay, which it concedes it is, the states' role will be preserved. Where Congress believed that a more specific deadline was needed, it expressly said so. It makes sense in the Agency's view that Congress imposed a four-month deadline on EPA review of original SIPs because it was concerned with getting the basic regulatory framework in place as quickly as possible. According to the Agency, this abbreviated time frame was feasible only because much of the groundwork for the original SIPs had been done prior to the start of the four-month period. Once the initial pollution controls were in place, however, the EPA believes Congress did not intend for it to continue working at such a hectic pace. Moreover, it simply is not possible, the Agency argues, for it to review every SIP revision within four months without sacrificing competing priorities.

We begin by stating that we do not believe this is an appropriate issue on which to defer to the Agency. We concede that there is some doubt as to Congress' intentions, but the mere existence of ambiguity is not reason enough in our view to defer. Congress did not use inherently broad language here suggesting that it intended for the EPA to fill in the gaps, nor is there any other indication that Congress wished to delegate interpretive authority to the Agency on this issue. Moreover, we think it dangerous to defer in a situation such as this where the Agency has a substantial institutional interest in not imposing constraints on itself.

The question admittedly is a close one, but on balance we believe GM's (and the Commonwealth's) reading of the Act is the correct one. Congress clearly was concerned with preserving the states' ability to tailor SIPs to local needs and conditions and, just as plainly, did not care what controls states chose, so long as they were designed to reduce emissions to nationally acceptable levels. The states' freedom to make such choices obviously is curtailed to the extent that SIPs must be consistent with federal standards. It seems

unlikely, however, that Congress also intended for the states' legitimate policy choices to be held hostage to the EPA's schedule. We conclude, therefore, that the four-month deadline was meant to apply to EPA review of SIP revisions as well as to EPA review of original SIPs. This conclusion is in line with the views of all but one of our sister circuits. *See Duquesne Light*, 698 F.2d 456, 471 (D.C. Cir. 1983) (four-month deadline); *American Cyanamid Co.* v. *U.S.E.P.A.*, 810 F.2d 493, 495 (5th Cir. 1987) (same) *Council of Commuter Organizations* v. *Thomas*, 799 F. 2d 879, 888 (2nd Cir. 1986) (same); *but see United States* v. *National Steel Corp.*, 767 F.2d 1176, 1182 n.1 (6th Cir. 1985) (no four-month rule, but arguably dicta). We add that by imposing a four-month deadline on the EPA, we avoid the possibility that the Agency would have assigned a lower priority to SIP revisions from First Circuit states than to those from states in circuits that had imposed a deadline.

III

The question that remains is what consequences should flow from the Agency's failure to observe the four-month deadline. The two circuits that have addressed the issue, the Fifth and the D.C., have taken extreme and directly contrary approaches. The district court adopted the Fifth Circuit's rule in *American Cyanamid Co.* v. *U.S.E.P.A.*, 810 F.2d 493 (5th Cir. 1987), and held that if the Agency misses the statutory deadline, it is barred from collecting penalties under the existing SIP for the interval between the end of the four-month period and the time the agency finally rules on the revision. The Fifth Circuit believed this rule necessary because without the prospect of an enforcement bar looming over the review process, there simply would be too little incentive for the Agency to comply with the four-month time limit. The court stressed that its holding was based on "the importance of the EPA acting, not for the benefit of American Cyanamid, but for the benefit of the State of Louisiana

which is by statute designated to play a significant cooperating role with the EPA." *Id.* at 500.

In reaching this result, the *American Cyanamid* court discussed at length the contrary approach adopted by the D.C. Circuit in *Duquesne Light*, 698 F.2d 456. Rather than bar the Agency from enforcing an existing SIP, the D.C. Circuit concluded that after four months, the penalty should be held in abeyance pending the Agency's final decision on the proposed revision. If the revision is ultimately rejected, penalties may be assessed retroactively, with interest, for the entire period after the deadline. The Fifth Circuit rejected this rule on the ground that it gives the Agency little or no incentive to conclude its review within the statutory time limit because, no matter how long the Agency procrastinates, it knows that it may collect full penalties if the revision is ultimately rejected. *American Cyanamid*, 810 F.2d at 499.

There is no question that the Fifth Circuit's rule provides the Agency with the greatest incentive to complete its review within four months. Were we certain that with the incentive of an enforcement bar, the Agency not only would review every SIP revision within four months, but could do so in a thorough and complete manner without sacrificing equally important congressional objectives, we would be willing to consider such a remedy. But far from being certain that the Agency could accomplish this task, we think it likely that the Agency frequently will need longer than four months to issue a considered ruling, and will therefore miss the deadline even with the incentive of an enforcement bar.

The EPA adds that if the Agency's failure to meet the four-month deadline automatically resulted in an enforcement bar, states might simply flood the Agency with disingenuous SIP revisions at the behest of influential companies, thereby ensuring that the bar was triggered. Although we recognize that Congress was concerned with the possibility of states placing their local interests above the goal of pure air, we find it unnecessary here to invoke the specter of states em-

ploying unsavory tactics. We think that even with the submission of only good-faith proposals, the EPA inevitably will often miss the deadline.

Given this practical reality, we are left with the question of whether the additional incentive provided by the Fifth Circuit's rule and the resulting benefit to the states of hurried EPA action outweighs the harm done to the general public by prohibiting enforcement actions in those inevitable instances when the Agency fails to meet its deadline. Because we believe that the Clean Air Act sets up a hierarchy of priorities in which the goal of improving the nation's air plainly takes precedence over the states' interests in protecting its local industry, we opt for a remedy short of an automatic bar.

In our view, an enforcement bar simply is too drastic. If the EPA cannot enforce existing standards, it is the public and not the EPA that is hurt. It does not matter why the EPA failed to meet the time limit—the public is hurt by an enforcement bar regardless of the reason for the Agency's tardiness. We agree with the Fifth Circuit, however, that the D.C. Circuit's rule appears to err on the other end by giving the Agency too little incentive to act in a timely manner. Accordingly, we have attempted to steer a middle course between these two extremes, one which permits trial courts to take account of the circumstances of each case and hopefully accommodate both the states' needs and the public's desire for clean air.

The remedy we suggest is twofold. First, if in a company's view the EPA is taking too long to review a proposed revision, the company may at any time after the end of the four-month period bring suit in the district court under § 304(a)(2) of the Act to compel agency action. 42 U.S.C. § 7604(a)(2). *See Council of Commuter Organizations*, 799 F.2d at 888 (2nd Cir. 1986). The district court should assess the Agency's reasons for not complying with the four-month time limit and take such action as it deems reasonable. The

court should not, of course, equate the Agency's failure to meet the four-month time limit with Agency unreasonableness. To do so would be tantamount to adopting the Fifth Circuit's automatic bar rule. Rather, the court should evaluate the circumstances of each case, with the failure to observe the four-month deadline being one factor to consider—a rough guidepost. In some cases, the court undoubtedly will find that four months is sufficient and in others, it will be clear that the Agency could not reasonably have met the deadline. We note that in this case, despite the clear availability of this remedy, GM did not bring an action to compel the Agency to act.

The second remedy for EPA delay is of the same nature. When the Agency brings an enforcement action under § 113, the district court has the responsibility for determining the amount of penalties to assess. The Act expressly permits the court to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." § 113(b). The EPA agrees that, among these "other factors," the court may consider the reasonableness of the Agency's delay and the prejudice, if any, suffered by the company as a result. If, for example, a trial court finds that the review process should have taken ten months rather than two years, it may decline to award penalties for the fourteen months of unwarranted delay. Accordingly, if on remand in this case, the district court finds that GM was prejudiced by the Agency's lengthy review and that the delay was not justified or that some portion of the delay was not justified, it may reduce the penalties in a manner it sees fit.[8]

We think that giving the district court the power to adjust the penalties will provide the Agency with the necessary

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[8] We do not understand EPA's position in this case to be that because GM did not bring an earlier action to compel an Agency decision, it has forfeited the right to argue below that the Agency's delay was unreasonable.

incentive to act without unreasonable delay.[4] To have chosen the more drastic remedy of an enforcement bar and thereby place the states' interests over the public's, we would have needed some indication from Congress that the public was to bear the brunt of the Agency's failure to observe a deadline. As the Supreme Court reiterated in *Brock* v. *Pierce County*, 476 U.S. 253 (1986), "the great principle of public policy, applicable to all governments alike, . . . forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Id.* at 260 (internal quotes omitted). We find it significant that not even the Commonwealth argues for an enforcement bar, thus recognizing that its interests occasionally must yield to the overriding goal of improving our nation's air. Hopefully the remedies we provide will induce prompt EPA action and thus ensure that the interests of the states need not yield too far.

GM claims that an enforcement bar is necessary, however, not only to induce timely action by the Agency, but also to protect the integrity of the review process. Citing this case as a particularly egregious example, it argues that when the Agency brings an enforcement action prior to issuing its final decision, the possibility exists that the Agency will reject the proposal for the sole purpose of supporting its pending enforcement action. We think this argument proves too much. If the Agency were to initiate an enforcement proceeding under the existing SIP after two months and then reject the proposed revision one month later but within the four-month time limit, GM still could argue that the Agency rejected the revision in order not to undermine its enforcement proceeding. Thus, the potential for Agency bias results

[4] We note that both the D.C. Circuit and Fifth Circuit were dealing with § 120 penalties rather than a § 113 enforcement action. It is not clear whether, under § 120, penalties may be adjusted in this manner. If they can, it may very well be that, contrary to our earlier suggestion and the Fifth Circuit's understanding, the D.C. Circuit's rule does contemplate that unreasonable Agency delay will be taken into account in assessing penalties.

not from the Agency's failure to complete its review within four months but from Congress' decision to assign the EPA the responsibility for both reviewing plans and enforcing them. To the extent, then, that this is a potential problem in all cases, we are not overly concerned. Congress expressly provided companies with a means of challenging final Agency decisions in the courts of appeals. *See* § 307(b)(1). Apparently GM has availed itself of this remedy and we are confident that if the Commonwealth's revision was denied for improper reasons, the court will take appropriate action.[5]

Finally, GM raises a number of issues concerning the equities of this case. It claims, among other things, (1) that the company relied on the Agency's 1981 policy statement in deciding to convert its plant to BC/CC technology; (2) that its decision to wait until June of 1985 to propose the conversion was not made in bad faith; and (3) that the public was not harmed because its present system is environmentally superior. On the record before us, we simply have no way of assessing the validity of these claims, nor is it important that we do so. This appeal required us to interpret the Act and devise a generally applicable rule. Because these final claims are peculiar to the instant case and do not raise systemic issues suggesting the superiority of one rule or another, they need not concern us here. GM is of course free to raise them before the district court. Indeed, we have

[5] We note that in this case the Agency did not bring its enforcement action until after Region I had recommended to EPA Headquarters that the Commonwealth's revision be rejected. Headquarters apparently may reject this recommendation. But the timing of events does suggest that, as of August 17, 1987, when the enforcement action was initiated, there was little hope of the Commonwealth's proposal being approved. We, of course, take no definitive position on whether this was in fact the case.

declined to adopt an inflexible rule precisely so that the equities of each case may be considered.[6]
Reversed and remanded for further proceedings not inconsistent with this opinion.

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[6] We add that by not precluding enforcement where the Agency fails to meet its deadline, we avoid possibly rendering superfluous the actions of a later Congress. In the 1977 Amendments to the Clean Air Act, Congress added § 110(g), which gives governors the power in emergency situations to suspend an existing SIP for a short period. The Governor may do so where (1) the EPA has not acted on a proposed SIP revision within "the required four month period"; (2) the state believes the revision meets the substantive requirements of the Act; and (3) the revision is necessary to prevent substantial unemployment due to plant closings. This section makes clear that the 1977 Congress believed the 1970 Amendments imposed a four-month deadline on the Agency's review of SIP revisions. It also shows that this later Congress did not assume that if the Agency missed the deadline, it automatically would lose its power to enforce the existing SIP until such time as it issued a final decision. Otherwise, there would have been no need to give governors the power to suspend enforcement of an existing SIP while a revision was pending, since the existing SIP already would be unenforceable due to the Agency's failure to meet the four-month deadline. The Act, however, clearly gives the Governor the power to suspend the existing SIP prior to the Agency's final decision.

APPENDIX B

General Motors Corporation is not a subsidiary of a publicly owned corporation. All subsidiaries and affiliates of General Motors Corporation are wholly owned except the following:

ACE Limited (Bermuda)
Aero Vironment Inc. (USA)
Alambrados Automotrices, S.A. de C.V. (Mexico)
Alambrados y Circuitos Electricos, S.A. de C.V. (Mexico)
AMBRAKE Corporation (USA)
Applied Intelligence Systems, Inc. (USA)
Aralmex, S.A. de C.V. (Mexico)
Asset Leasing GmbH (West Germany)
Automotive Polymer Based Composites Joint Venture and Development Partnership (Co-Partnership among GM, Ford and Chrysler to coordinate basic research on plastic component materials)
Automotive Satellite Television (USA)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Avis, Inc. (USA)
Beijing International Information Processing Company, Limited (China)
British Caledonian Flight Training, Limited (England)
Bujias Mexicanas, S.A. de C.V. (Mexico)
Calsonic Harrison Co., Ltd. (Japan)
Comau Productivity Systems, Inc. (USA)
Compagnie de Faisceaux Tunisian International S.A. (Tunisia)
Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)
Componentes Delfa, C.A. (Venezuela)
Convesco Vehicles Sales GmbH (West Germany)
Daewoo Automotive Components, Ltd. (Korea)
Daewoo Motor Co., Ltd. (Korea)

Delkor Battery Company, Ltd. (Korea)
Detroit Diesel Corporation (USA)
DHB—Componentes Automotivos S.A. (Brazil)
DHMS Industries, Ltd. (Korea)
Diffracto Limited (Canada)
Fabrica Colombiana de Automotores S.A. ("Colomotores") (Colombia)
Gemeinnutzige Opel-Wohnbau-Gesellschaft mbH (West Germany)
General Motors Bankgesellschaft mbH (Austria)
General Motors del Ecuador S.A. (Ecuador)
General Motors Kenya Limited (Kenya)
Genie Mecanique Zairose, S.A.R.L. (Zaire)
GM Allison Japan Limited (Japan)
GM Fanuc Robotics Corporation (USA)
Group Lotos, plc (England)
Hitachi Data Systems Corporation (USA)
Ilmor Engineering, Ltd. (England)
Industries Mecaniques Maghrebines, S.A. (Tunisia)
Industrija Delova Automobila, Kikinda (Yugoslavia)
Interactive Entertainment, Inc. (Canada)
Isuzu-General Motors Australia Limited (Japan)
Isuzu Motors Limited (Japan)
Isuzu Motors Overseas Distribution Corp. (Japan)
Japan Satellite Communications Network Corporation (Japan)
Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)
Koram Plastics Company, Ltd. (Korea)
Metal Casting Technology, Inc. (USA)
Motor Enterprises, Inc. (USA)
National Advanced Systems Corporation (USA)
New United Motor Manufacturing, Inc. (USA)
NHK Inland Corporation (Japan)

Omnibus BB Transportes, S.A. (Ecuador)
Promotora de Partes Electronics Automotrices (Mexico)
P.T. Mesin Isuzu Indonesia (Indonesia)
Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)
Shinsung Packard Company, Ltd. (Korea)
Sung San Company, Ltd. (Korea)
Suzuki Motor Co., Ltd. (Japan)
Tactical Truck Corporation (USA)
View Engineering (USA)
Volvo GM Heavy Truck Corporation (USA)

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No. 89-369

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS

Page

APPENDIX C

United States v. General Motors Corporation, No. 87-2068-Mc (D. Mass. May 16, 1988) SA-1

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 87-2068-Mc

UNITED STATES OF AMERICA,
Plaintiff,

v.

GENERAL MOTORS CORPORATION,
Defendant.

MEMORANDUM AND ORDER

May 16, 1988

Mc NAUGHT, D. J.

This action comes on to be heard on defendant General Motors' ("GM") motion to dismiss or, in the alternative, for summary judgment. Since affidavits and other documents outside the pleadings have been presented, we treat the matter as a motion for summary judgment. The issue before us is the Environmental Protection Agency's ("EPA") enforcement authority under the Clean Air Act (the "Act"), 42 U.S.C. § 7401 *et seq.*

The Clean Air Act provides for the EPA to establish National Ambient Air Quality Standards ("NAAQSs") which States must meet by specified deadlines. 42 U.S.C. § 7409. The states, in turn, are responsible for devising State Implementation Plans ("SIP") which regulate the specific details of how implementation is to be achieved. These SIPs must be submitted by the state to the EPA for approval. 42 U.S.C. § 7410. Then, by the terms of section 7410(a)(2):

> "The Administrator shall, within four months after the date required for submission of [the SIP], approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan . . . if he determines that it was adopted after reasonable notice and hearing and that [certain other criteria are met]."

Once the SIP has been approved by the EPA, it is enforceable under both State and federal law.

The original SIP is not necessarily the final word, however. Under 42 U.S.C. § 7410(a)(3)(A), the state may submit revised SIPs to the EPA for approval.

> "The Administrator shall approve revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and hearing."

The heart of the issue before us is whether this provision requires the EPA to approve or disapprove proposed SIP revisions within four months as is the case for original SIPs.

The facts before us are as follows: In February, 1979 the EPA promulgated NAAQSs having to do with photochemical oxidants, including ozone. One of the industries affected by these NAAQSs was the GM Plant in Framingham, whose painting facilities emitted volatile organic compounds ("VOCs") which react with the atmosphere to create ozone.

Later that year, the Massachusetts Department of Environmental Quality Engineering ("DEQE") submitted a proposed SIP which included provisions regulating VOC emissions from automobile surface coating operations. 310 CMR 7.18(7). GM's Framingham plant is the only such facility in the Commonwealth. EPA approved this regulation in 1980. 45 Fed. Reg. 61293, 61295. This SIP required GM to meet

compliance regulations in stages, with full compliance by December 31, 1985, some two years earlier than the maximum time allowed by the NAAQS.

In October 1981, the EPA published a policy statement which acknowledged a shift in automobile painting technology from the older lacquer-based process to a new basecoat/clear coat ("BC/CC") process, which would eliminate many prior pollution problems. 46 Fed. Reg. 51366. This statement provided that the EPA would allow revisions of SIPs which gave automakers until 1986 or, in some cases, 1987 to shift to the BC/CC process. *Id.* at 51367.

In November 1984, GM submitted a proposed compliance schedule to DEQE. This schedule related to the lacquer operations which were still in use at Framingham, and asked for an extension of time, beyond the end of 1985, to install the necessary emission controls. By June, 1985, however, GM had indicated its plans to convert the Framingham plant to the BC/CC process. This conversion was expected to take until the end of 1987. On December 30, 1985, the day before the final compliance deadline under the original SIP, DEQE proposed a revised SIP which would give GM until August 31, 1987 to comply with the NAAQS.

To make an already long story shorter, GM began construction of a new $200 million BC/CC facility while continuing its out-of-compliance (under the original SIP) lacquer operations. For its part, EPA Region I conducted negotiations with GM and DEQE on the matter, but with no satisfactory resolution. According to the affidavit of John L. Hamisch, the Chief of the State Air Programs Branch of EPA Region I, on May 30, 1986 Region I was prepared to send a proposed disapproval of the revised SIP to EPA Headquarters, but delayed this action at DEQE's request. The proposed disapproval did go to EPA Headquarters on July 2, 1986. Final decision on the matter has yet to take place as the paperwork has floated about the EPA.

Notwithstanding this, in August 1986 the EPA issued a "Notice of Violation" to GM based on the requirements of the original SIP, and on August 17, 1987, the United States brought this action. GM's new BC/CC plant was completed in July 1987, the lacquer plant closed permanently, and since that time GM has been in compliance with all applicable NAAQSs.

The issue before us—whether or not the provisions of section 7410(a)(3)(A) incorporate the four month deadline of section 7410(a)(2)—is an open question in this Circuit. As conceded by the government, however, the weight of authority is that it does. The most recent case to address the subject is *United States v. Alcan Foil Products, et al.*, (C.A. No. 87-0434 L (CS), W.D. Ky., March 15, 1988).

Alcan also involved SIPs and proposed SIP revisions dealing with VOC emissions, in that case from rotogravure printing presses. The facts are quite similar to those before us. The EPA approved the pertinent original SIP in 1981. In 1984 the EPA approved an initial revision of the SIP. In March of 1986, however, a second revision was proposed. Just over four months later, without taking action on the proposed SIP revisions, EPA served Alcan with a noncompliance notice. A year and one day later, having notified Alcan of perceived obstacles to approval of the proposed SIP, but not yet having acted upon it, EPA filed suit. As of the date of the *Alcan* decision, more than two years from the time Kentucky had proposed its revised SIP, the EPA had not yet acted.

The *Alcan* court relied heavily on the other principal case in this area, *American Cyanamid Co. v. EPA*, 810 F.2d 493 (5th Cir. 1987). As in *Cyanamid*, the court held that although the EPA had the authority to reject the proposed SIP and to enforce the old standard from that point on, it could take no enforcement action until then. *Alcan* at 4.

Any other result makes little sense from a practical standpoint. The very structure of the Clean Air Act describes a

cooperative venture in which federal authorities prescribe long-term national standards but allow each state, within limits, to determine the best way to reach them. *Cyanamid* at 500. Indeed, the language of section 7410(a)(3)(A) is such that

> "[t]he Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met . . . [S]o long as the ultimate effect of a State's choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission standards it deems best suited to its particular situation."

Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 79 (1975).

Were we to accept the government's interpretation of section 7410(a)(3)(A) the role of the states in this cooperative venture would be severely curtailed. Clearly, one of the reasons the states were authorized to propose revisions to SIPs is that they are closer to the problems and, therefore, better able to determine the best interests of their citizens and state industries in achieving the mandatory federal standards. A system which would allow EPA to proceed indefinitely without accepting or rejecting the state's plan, while at the same time enforcing the previous law, would put all the cards in federal hands. This is clearly contrary to the intent of the statute.

The United States makes much of the idea that proposed SIP revisions are different from original SIP proposals. This is so in part, they argue, because the groundwork for many original SIPs was already in place and because there was a

need, initially, to get up to speed in Clean Air Act enforcement. In addition, SIP approval was necessary before any of EPA's other activities could begin, whereas proposed SIP revisions must compete with other EPA priorities. Consequently, the government insists, "EPA [should be] entitled to a reasonable time for action on proposed SIP revisions submitted by the statutes, not constrained by the four-month period for decisions on original SIPs." (Plaintiff's Brief at 21).

We agree that the EPA should have a "reasonable" time to review and act upon proposed SIP revisions. As it is, we believe that the four month period which the *Alcan* and *Cyanamid* courts have agreed upon meets this standard. *Accord Duquesne Light Co. v. EPA*, 698 F.2d 456 (D.C. Cir. 1983); *Council of Commuter Organizations v. Thomas*, 799 F.2d 879 (2d Cir. 1986); *Council of Commuter Organizations v. Gorruch*, 683 F.2d 648 (2d Cir. 1982). *Contra United States v. National Steel Corp.*, 767 F.2d 1176 (6th Cir. 1985). This is so for a number of reasons.

First, the EPA always holds the ultimate trump card: it may at and time during or after the allowed four month period reject the proposal and invoke enforcement proceedings under the original SIP. Second, it strains credulity that truly important or controversial SIP revisions cannot be effectively identified early on in the process and scheduled for expedited review. This is especially so since SIP revisions will seldom be breaking "new ground," but will merely modify already approved procedures. Third, a period any greater than four months would leave both the states and the affected industries in an unjustifiable state of limbo. For an indefinite period, the state would be unable to act to balance dictated national priorities with the interests of its citizens and industries as the Clean Air Act intended. And the industries themselves, though fully in compliance with state law, would in some instances face the Scylla and Charybdis choice between ceasing operations now, or possibly being forced out of business by heavy fines later. Although it is not likely

that such fines in Framingham would force GM to bankruptcy, that would be cold comfort to Framingham workers who might be laid off while a new plant was being built or because the plant was moved out of state.

The provisions of 42 U.S.C. § 7410(a)(3)(A) do not call for that choice. We agree with the *Alcan* and *Cyanamid* courts and others that the statute parallels the provisions of section 7410(a)(2) in providing EPA with four months to render a decision on proposed SIP revisions. If a decision is delayed beyond that time, the EPA is prohibited from bringing or continuing enforcement proceedings under the original SIP until final action is taken.

The proposed SIP revision in issue here went to EPA nearly two and one-half years ago, and final action has yet to be taken. In the meantime, GM has built a brand new $200 million facility, shut down permanently the offending lacquer plant, and come into full compliance with the ozone NAAQSs. For EPA to complain at this point that it was not given "reasonable" time to act smacks of closing the barn door after the horse is already out. If the EPA is to achieve its stated objective in the future, it will have to get the door closed faster.

For all of the above reasons, defendant's motion for summary judgment is GRANTED.

SO ORDERED.

JOHN J. Mc NAUGHT
UNITED STATES DISTRICT JUDGE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, if we assume that there is a four-month time limit for Environmental Protection Agency (EPA) review of revised state implementation plans (SIPs) under Section 110(a)(3)(A) of the Clean Air Act (42 U.S.C. 7410(a)(3)(A)), the proper remedy for noncompliance is to bar the United States from bringing or continuing an enforcement action against a source of pollutants for violating the terms of the existing SIP.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

American Cyanamid Co. v. *EPA*, 810 F.2d 493 (5th Cir. 1987)	6, 7, 8, 11
Brock v. *Pierce County*, 476 U.S. 253 (1986)	13
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	3
Cook v. *Hudson*, 429 U.S. 165 (1976)	15
Costle v. *Pacific Legal Foundation*, 445 U.S. 198 (1980)	10
Council of Commuter Organizations v. *Gorsuch*, 683 F.2d 648 (2d Cir. 1982)	8
Council of Commuter Organizations v. *Thomas*, 799 F.2d 879 (2d Cir. 1986)	8
Dayton Bd. of Educ. v. *Brinkman*, 433 U.S. 406 (1977)	8
Duquesne Light Co. v. *EPA*, 698 F.2d 456 (D.C. Cir. 1983)	6-7, 8, 11
E.I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977)	13
Rice v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955)	15
Train v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975)	2, 11
Triangle Improvement Council v. *Ritchie*, 402 U.S. 497 (1971)	15
TVA v. *Hill*, 437 U.S. 153 (1978)	13
United States v. *Alcan Foil Products, Division of Alcan Aluminum Corp.*, 694 F. Supp. 1280 (W.D. Ky. 1988), appeal pending, No. 88-6300 (6th Cir.)	9, 14

Cases—Continued: Page

United States v. *Ford Motor Co.*, 814 F.2d 1099 (6th Cir.), cert. denied, 484 U.S. 822 (1987) 11
United States v. *National Steel Corp.*, 767 F.2d 1176 (6th Cir. 1985) 8-9

Statutes:

Administrative Procedure Act:
5 U.S.C. 555(b) 9
5 U.S.C. 706(1) 10
Clean Air Act, 42 U.S.C. 7401 *et seq.*:
§ 108, 42 U.S.C. 7408 2
§ 109, 42 U.S.C. 7409 2
§ 110(a)(1), 42 U.S.C. 7410(a)(1) 2
§ 110(a)(2), 42 U.S.C. 7410(a)(2) 2, 9, 10
§ 110(a)(2)(A), 42 U.S.C. 7410(a)(2)(A) 2
§ 110(a)(2)(I), 42 U.S.C. 7410(a)(2)(I) 2
§ 110(a)(3)(A), 42 U.S.C. 7410(a)(3)(A) 2, 5, 8, 9, 10
§ 110(d), 42 U.S.C. 7410(d) 2, 11
§ 113, 42 U.S.C. 7413 ..... 5, 11, 13, 14
§ 113(a), 42 U.S.C. 7413 (a) 3
§ 113(b), 42 U.S.C. 7413(b) 3, 10
§ 113(b)(2), 42 U.S.C. 7413(b)(2) 10-11, 13
§ 113(c), 42 U.S.C. 7413(c) 3
§ 113(d), 42 U.S.C. 7413(d) 4-5
§ 120, 42 U.S.C. 7420 ..... 3, 14
§ 120(d)(2), 42 U.S.C. 7420(d)(2) 3
§ 120(d)(3)(C)(ii), 42 U.S.C. 7420(d)(3)(C)(ii) 3
§ 171(2), 42 U.S.C. 7501(2) 2
§ 172(b), 42 U.S.C. 7502(b) 2
§ 172(b)(2), 42 U.S.C. 7502(b)(2) 5
§ 307(b)(1), 42 U.S.C. 7607(b)(1) 12
Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 2
Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 2

Miscellaneous: Page

46 Fed. Reg. (1981):
p. 51,386 4
p. 51,387 4
51 Fed. Reg. 43,394 (1986) 5
54 Fed. Reg. 2214 (1989) 16
H.R. 99, 101st Cong., 1st Sess. (1989) 14-15
H.R. 2323, 101st Cong., 1st Sess. (1989) 15
H.R. 3030, 101st Cong., 1st Sess. (1989) 15
H.R. Rep. No. 294, 95th Cong., 1st Sess. (1977) 12
S. 1490, 101st Cong., 1st Sess. (1989) 15
S. 1630, 101st Cong., 1st Sess. (1989) 15

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-18a) is reported at 876 F.2d 1060. The opinion of the district court (Pet. Supp. App. SA1-SA7) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on June 7, 1989. The petition for a writ of certiorari was filed on September 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Amendments of 1970 (Pub. L. No. 91-604, 84 Stat. 1676) charge EPA with responsibility for establishing National Ambient Air Quality Standards (NAAQS) for pollutants which cause or contribute to air pollution. §§ 108, 109, 42 U.S.C. 7408, 7409. Section 110(a)(1) of the Clean Air Act requires each State to develop and submit to EPA for approval, within nine months after EPA's promulgation of NAAQS, an implementation plan designed to achieve and maintain the NAAQS within the State. 42 U.S.C. 7410(a)(1). Section 110(a)(2), in turn, requires EPA, within four months of receiving the original state implementation plan (SIP), to determine whether the SIP meets certain statutory requirements (42 U.S.C. 7410(a)(2)), including attainment of applicable primary NAAQS "as expeditiously as practicable" but generally no later than three years from the date of approval of the SIP. 42 U.S.C. 7410(a)(2)(A). Section 110(a)(3)(A) requires EPA to approve revisions to existing SIPs if EPA determines that the revised SIP meets the requirements applicable to original SIPs. 42 U.S.C. 7410(a)(3)(A). Sources of pollutants are subject to the existing SIP, however, until the proposed revision is approved by both the State and EPA. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 92 (1975); 42 U.S.C. 7410(d). Unlike Section 110(a)(2), Section 110(a)(3)(A) contains no express time limit for acting on revisions.

The Clean Air Act Amendments of 1977 (Pub. L. No. 95-95, 91 Stat. 685) added further requirements for SIPs applicable to "nonattainment area[s]"—areas where air quality falls short of the NAAQS. See Sections 110(a)(2)(I), 171(2), 172(b), 42 U.S.C. 7410(a)(2)(I), 7501(2), 7502(b). The

Amendments required each State containing a nonattainment area to prepare and secure EPA approval of a new SIP by July 1, 1979; the deadline for actual attainment of the primary NAAQS was extended to December 31, 1982, and further extensions were permitted in some cases to December 31, 1987, but the SIPs for non-attainment areas were required to contain provisions designed to achieve the NAAQS as expeditiously as possible. See generally *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 849 (1984).

Section 113(a) of the Act authorizes EPA to issue a notice to any person who is violating a SIP, and, if the violation extends beyond 30 days after notice, to enforce the SIP by issuing an administrative order or instituting a civil action. 42 U.S.C. 7413(a). Injunctions, civil penalties of up to $25,000 per day of violation, and criminal penalties for knowing violations are authorized. 42 U.S.C. 7413(b) and (c). In determining the amount of a civil penalty, the district court is directed to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." 42 U.S.C. 7413(b). An additional means of enforcement is provided in Section 120 (42 U.S.C. 7420). Under Section 120, EPA may administratively assess a noncompliance penalty against any major stationary source in violation of SIP emission limits. The penalty begins to accrue when EPA issues a notice of noncompliance, and is intended to remove the economic benefit of delayed compliance. 42 U.S.C. 7420(d)(2) and (3)(C)(ii).

2. The entire State of Massachusetts is a nonattainment area for the ozone NAAQS. In 1980, EPA

approved Massachusetts' proposed non-attainment area state implementation plan. This SIP required the painting operations at petitioner's Framingham automobile assembly plant to meet increasingly stringent limits on emissions of volatile organic compounds (VOC), which contribute to ozone. Full compliance was required by December 31, 1985. Pet. App. 6a.

On October 20, 1981, EPA published a policy statement discussing the automobile industry's conversion from lacquer paints to basecoat/clearcoat (BC/CC) technology, as a means of reducing VOC emissions. 46 Fed. Reg. 51,38[illegible]. EPA stated that it would entertain proposed SIP revisions intended to allow automakers until as late as the end of 1986 to install new painting technology, with some plants requiring until 1987 to convert. *Id.* at 51,387. Petitioner submitted requests consistent with the policy statement for three of its assembly plants, but not for its Framingham plant. More than three years later, in November 1984, petitioner submitted to Massachusetts a request to extend the December 31, 1985, compliance date to give petitioner additional time to install emission controls on the lacquer coating lines. In June of 1985, however, petitioner changed its plans and proposed converting the plant to BC/CC by the summer of 1987. On December 30, 1985, one day before the final compliance deadline in the SIP, Massachusetts submitted to EPA a proposed SIP revision extending petitioner's compliance date to the summer of 1987. Pet. App. 6a-7a.

EPA's Region I office began reviewing the proposed SIP revision while negotiating with petitioner and the State in an attempt to resolve petitioner's noncompliance with the existing SIP by means of a delayed compliance order under Section 113(d) of the

Act, 42 U.S.C. 7413(d). The negotiations proved fruitless, however. On July 2, 1986, EPA Region I sent a draft proposal to disapprove the SIP revision to EPA Headquarters. Pet. App. 7a. EPA's notice of proposed disapproval was published in the Federal Register on December 2, 1986. 51 Fed. Reg. 43,394. EPA pointed out (*ibid.*) that the proposed SIP revision failed to meet several of the criteria established in EPA's 1981 policy statement, and in particular failed to require the implementation of reasonably available control technology as expeditiously as practicable, as required by the Act. See Section 172(b)(2), 42 U.S.C. 7502(b)(2). On June 30, 1987, following the receipt of public comment on the proposed SIP revision, Region I transmitted to EPA Headquarters a draft of a final decision disapproving the proposed SIP revision. EPA published its final decision disapproving the proposed SIP revision on September 16, 1988. Pet. App. 7a-8a.

3. On August 17, 1987, the United States filed an action against petitioner under Section 113 of the Act, 42 U.S.C. 7413, to enforce the existing SIP's 1985 deadline. Pet. App. 7a-8a. At that point, EPA had published its proposed disapproval of the SIP revision, but EPA headquarters had not yet acted on Region I's draft final decision of disapproval. The complaint alleged violations by petitioner of the VOC emission standards of the existing SIP from January 1, 1986, until petitioner shut down the plant in the summer of 1987 to convert to the new basecoat/clearcoat process. On petitioner's motion, the district court dismissed the action. The district court construed Section 110(a)(3)(A) of the Act to impose a four-month time limit on EPA's review of SIP revisions, and held that EPA was barred from enforcing

the existing SIP once the four months had passed. Pet. Supp. App. SA1-SA7.

The court of appeals reversed and remanded. The court agreed with the district court that the four-month deadline explicitly imposed by the Act on EPA's review of original SIPs should also apply to the review of SIP revisions. Although it found the question "a close one" (Pet. App. 11a), the court concluded that Congress would not have wanted the States' policy choices "to be held hostage to the EPA's schedule" (*id.* at 12a). The court noted that, "by imposing a four-month deadline on the EPA," it avoided "the possibility that the Agency would have assigned a lower priority to SIP revisions from First Circuit states than to those from states in circuits that had imposed a deadline" (*ibid.*).

The court of appeals refused, however, to follow the Fifth Circuit's holding in *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (1987), that EPA is barred from enforcing an existing SIP when EPA takes more than four months to act on a proposed SIP revision. The court reasoned that an enforcement bar was too drastic a remedy for agency delay, especially since it penalized the public's interest in clean air, rather than the agency (Pet. App. 14a). The court also found it likely that EPA would frequently need longer than four months to issue a considered ruling, and would therefore miss the deadline even with the incentive of an enforcement bar (*id.* at 13a-14a). At the same time, the court rejected the D.C. Circuit's alternative approach. As the court explained, the D.C. Circuit had held that, if a SIP revision is ultimately rejected, "penalties may be assessed retroactively, with interest, for the entire period after the deadline" (Pet. App. 13a, citing

Duquesne Light Co. v. *EPA*, 698 F.2d 456 (1983)). Seeking to "steer a middle course between these two extremes" (Pet. App. 14a), the court concluded that the appropriate remedies for agency inaction were (1) a suit to compel agency action unreasonably delayed; or (2) a request by the subject of an enforcement proceeding for reduction or elimination of penalties during any period in which unreasonable agency delay resulted in prejudice (*id.* at 14a-15a). The court stated that the agency's failure to act within four months would not necessarily be unreasonable (*id.* at 15a).

The court remanded the case to the district court for further proceedings, and specified that, "if on remand in this case, the district court finds that [petitioner] was prejudiced by the Agency's lengthy review and that the delay was not justified or that some portion of the delay was not justified, it may reduce the penalties in a manner it sees fit." Pet. App. 15a. The court further observed that petitioner is free to raise a variety of issues "concerning the equities of this case" before the district court on remand. *Id.* at 17a.

ARGUMENT

The court of appeals correctly vacated the district court's dismissal of the government's enforcement action. If we assume for present purposes that a four-month limit does apply to EPA's review of SIP revisions, the court of appeals properly concluded that enforcement of the existing SIP is not barred if EPA's consideration of the SIP revision takes longer than four months. Although the enforcement bar ruling conflicts with the rationale of *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (5th Cir. 1987), and although the issues raised by petitioner are not in-

substantial, we submit that granting review would not be appropriate at this time because further proceedings in the district court may affect the outcome of the case and because Congress is considering amendments to the Clean Air Act which could resolve, or at least significantly alter, the contours of the enforcement bar issue.

1. As the court of appeals recognized (Pet. App. 5a), Section 110(a)(3)(A), which governs review of SIP revisions, does not impose an explicit time limit on the agency's review.[1] Nevertheless, the court below, explicitly stating that the States in the First Circuit thus would not be disadvantaged, agreed with the rule adopted in three other circuits and applied the four-month time limit for consideration of original SIPs to EPA's consideration of SIP revisions (Pet. App. 11a-12a). See *American Cyanamid Co.*, 810 F.2d at 495 (four-month limit applies to SIP revisions); *Council of Commuter Orgnizations* v. *Thomas*, 799 F.2d 879, 888 (2d Cir. 1986) (same); *Council of Commuter Organizations* v. *Gorsuch*, 683 F.2d 648, 651 n.2 (2d Cir. 1982) (same); *Duquesne Light Co.* v. *EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983) (same); but see *United States* v. *National*

[1] Although the four-month limit issue is not presented in the petition, the court's holding that there is such a limit forms a necessary predicate for petitioner's argument that enforcement is barred after four months. If the Court grants the petition, it will be permissible for the United States to argue, as an alternative ground for upholding the court of appeals' judgment reversing the dismissal of the enforcement action, that there is no four-month time limit for EPA review of SIP revisions. *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 419 (1977). Because the court of appeals' present decision is interlocutory, the United States could also present that question to this Court in a petition from a final judgment.

Steel Corp., 767 F.2d 1176, 1182-1183 n.1 (6th Cir. 1985) (four-month limit does not apply to SIP revisions).[2] Although Section 110(a)(3)(A) says only that the revised SIP must meet the requirements of Section 110(a)(2), the courts (except for the Sixth Circuit) have found an implied requirement that EPA meet the four-month limit found in Section 110(a)(2). In view of the fact that the statutory language does not provide a four-month deadline, and in view of the fact that Congress was explicit about other deadlines in the Clean Air Act, the application of the Section 110(a)(2) deadline for initial agency approval of SIPs as a Section 110(a)(3)(A) deadline for subsequent agency review of SIP revisions is unwarranted.

Sound reasons support the difference in applicable deadlines suggested by the language of the statute. SIP revisions frequently involve relaxation or delay of strict emission control requirements, which, given their sheer number and complexity (as well as the requirement for notice and comment), cannot realistically be processed so quickly. See Pet. App. 14a ("EPA inevitably will often miss the deadline."). A four-month deadline is not necessary to uphold the States' role in the process; the Administrative Procedure Act itself requires agencies to conclude matters "within a reasonable time" (5 U.S.C. 555(b)) and

[2] The Sixth Circuit is presently considering the United States' appeal from a decision holding, despite the Sixth Circuit's *National Steel* decision, that the four-month limit applies to EPA's review of SIP revisions, and that enforcement of the existing SIP is barred after the four month period passes. *United States* v. *Alcan Foil Products, Division of Alcan Aluminum Corp.*, 694 F. Supp. 1280 (W.D. Ky. 1988), appeal pending, No. 88-6300 (argued Aug. 3, 1989).

provides a remedy for agency action "unreasonably delayed." 5 U.S.C. 706(1); *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 220 n.14 (1980). As a threshold matter, then, we do not agree with the court of appeals' interpretation imposing a four-month deadline on EPA's SIP revision determination; the lack of a deadline in the statute, however, provides an alternative ground for defending the judgment of the court of appeals.

2. If the Section 110(a)(2) deadline does apply to Section 110(a)(3)(A) revisions, the court of appeals correctly concluded that EPA's failure to meet the deadline should not lead to an absolute bar of enforcement actions for violations of the original SIP in the interval between the end of the four-month deadline and the agency's action on the revision. The statute does not address the enforcement consequences of the EPA's failure to act within a specified period, and the court found no "indication from Congress that the public was to bear the brunt of the Agency's failure to observe a deadline." Pet. App. 16a. The court noted that Section 113(b) permits a court, in assessing penalties, to "'take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation'" (Pet. App. 15a) and concluded that "giving the district court the power to adjust the penalties will provide the Agency with the necessary incentive to act without unreasonable delay" (*id.* at 15a-16a).

The court of appeals' analysis comports with the statute. The statute states that EPA may bring an action for penalties and injunctive relief whenever a person is in violation of any requirement of an "applicable implementation plan." § 113(b)(2), 42

U.S.C. 7413(b)(2). Without question, the existing SIP remains the "applicable" plan even after the State has submitted a proposed revision. See Section 110(d), 42 U.S.C. 7410(d); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. at 92; *American Cyanamid Co.*, 810 F.2d at 495; *United States* v. *Ford Motor Co.*, 814 F.2d 1099, 1102 (6th Cir.), cert. denied, 484 U.S. 822 (1987); *Duquesne Light Co.*, 698 F.2d at 471. Thus, barring enforcement actions after the four-month deadline would create a category of immunity from Section 113 enforcement actions that the statute itself does not envision.

The court of appeals properly rejected the conclusion of the Fifth Circuit, in *American Cyanamid Co.*, that barring enforcement of the applicable SIP if EPA has not acted on a proposed revision within four months would further the purposes of the Act. The Fifth Circuit concluded that an enforcement bar was necessary to penalize EPA for "contumaciousness," to preserve the role of the States under the Act, and to assure even-handed consideration of SIP revision requests. *American Cyanamid Co.*, 810 F.2d at 499. The court of appeals here persuasively rebutted each of the Fifth Circuit's policy justifications for an enforcement bar. The penalty rationale fails because "[i]f the EPA cannot enforce existing standards, it is the public and not the EPA that is hurt" (Pet. App. 14a). The federalism rationale is equally flawed, because an enforcement bar may not be in the States' interest (as Massachusetts itself recognized here (*id.* at 16a)), and because the alternative remedies suggested by the court "ensure that the interests of the state need not yield too far" (*ibid.*). The speculative possibility that an enforcement action could

undermine even-handed administration and influence the outcome of the final decision on a SIP revision stems not from agency delay but from Congress's decision to assign both enforcement and SIP review responsibilities to the same agency (*id.* at 16a-17a). In addition, Congress provided an adequate remedy for anyone aggrieved by an allegedly biased decision by providing for review of final agency decisions in the courts of appeals. § 307(b)(1), 42 U.S.C. 7607(b)(1). Indeed, GM has invoked that remedy here (Pet. App. 17a). Thus, as the court of appeals concluded, an enforcement bar is not necessary to further the purposes of the Act.

An enforcement bar, moreover, may have serious adverse consequences. It could encourage industries to propose last-minute SIP revision proposals for the purpose of staying EPA enforcement actions and postponing compliance with SIP provisions which Congress required to be achieved within the deadlines set forth in the Act and the SIPs themselves. If existing SIPs cannot be enforced by EPA, noncomplying sources in States that propose revisions will gain unfair advantage over those in other States, and the public will suffer from further delays in attainment of national air quality standards, contrary to Congress's clear intent. See, *e.g.*, H.R. Rep. No. 294, 95th Cong., 1st Sess. 71-72 (1977).[3]

[3] The facts of this case illustrate the negative results of an enforcement bar. Petitioner had more than ample time (five years) to bring its plant into compliance with the emission limits of the 1980 SIP either by installing control devices on its lacquer coating lines or by converting to the basecoat/clearcoat process without undue delay. Instead of making the investment necessary to achieve this result, petitioner waited until shortly before the deadline to propose a solution (the basecoat/clearcoat process) that would require a further one and one-half-year extension of the SIP time limits. Allowing petitioner to follow this course of conduct without penalty would ignore the damage to the public interest caused by the one and one-half-year delay in reaching the stricter emission limits, and would give petitioner an economic advantage over companies that made the investments necessary to meet applicable limits in a timely fashion.

A more fundamental defect in the approach adopted by the Fifth Circuit and advocated by petitioner is its misconception of the nature of the courts' role. Congress provided for enforcement of the "applicable" SIP (42 U.S.C. 7413(b)(2)), and made no exception for the situation in which a proposed revision has been pending for more than four months. It is not the province of the judiciary to carve out such an exception based on notions of "what accords with 'common sense and the public weal.'" *TVA* v. *Hill*, 437 U.S. 153, 195 (1978). Cf. *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 (1977) ("The question * * * is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended * * *."). As this Court stated in *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986) (footnote omitted): "When * * * there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act." Less drastic remedies are available here (Pet. App. 14a-15a). Thus, even if we assume that there is a four-month deadline, the court below was correct in rejecting the *American Cyanamid Co.* enforcement bar rule.[4]

[4] As the court of appeals noted (Pet. App. 16a n. 4), this case arose under Section 113 of the Act, 42 U.S.C. 7413, which explicitly directs the courts to consider a number of equitable factors before assessing a penalty; *American Cyanamid Co.* and *Duquesne Light Co.*, in contrast, arose under

3. Although the court of appeals' decision rejected the rationale of *American Cyanamid Co.*, and although the issue is of considerable importance, two factors counsel against review of the issue at this time. First, the court of appeals' decision is interlocutory. The remand to the district court—and possible further review by the court of appeals—may greatly clarify both the interests at stake in this litigation and the practical operation of the First Circuit's newly announced standard. Review at this stage, before the district court has had an opportunity to consider petitioner's claims regarding the "equities of this case" (Pet. App. 17a), would thus be premature.

Second, Congress is currently considering major amendments to the Clean Air Act. Several pending proposals address problems caused by application of a four-month limit to SIP revisions and adopt a time period of either twelve months or nine months for the review of SIP revisions.[5] Similarly, several of the

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Section 120, 42 U.S.C. 7420, which provides a procedure for EPA to collect penalties for noncompliance, but does not expressly authorize the consideration of equitable factors. Thus it is possible that the apparent conflict between *American Cyanamid Co.* and the court of appeals in this case can be reconciled by viewing the different conclusions as resting on the different statutory provisions; neither court, however, limited its analysis in such a fashion. The Sixth Circuit is currently considering the enforcement bar issue in a proceeding in which the agency proceeded both under Section 113 and Section 120. *United States* v. *Alcan Products, Division of Alcan Aluminum Corp.*, No. 88-6300 (argued Aug. 3, 1989); see note 2, *supra*.

[5] Three bills would require EPA to act on a SIP revision within twelve months of EPA's certification that the proposed revision meets certain minimum criteria. See H.R. 99,

bills introduced this session contain explicit confirmation of EPA's power to enforce the existing SIP until the time when the proposed revision is actually approved.[6] Such statutory revisions, if enacted, may raise the question whether a previously granted writ of certiorari should be dismissed. *See Cook* v. *Hudson*, 429 U.S. 165, 165-66 (1976); *Triangle Improvement Council* v. *Ritchie*, 402 U.S. 497, 498-499 (1971) (Harlan, J., concurring); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 76-77 (1955). It is also possible that a grant of certiorari at this time might affect congressional consideration of the clarification proposals, and of the need for them.[7]

101st Cong., 1st Sess. § 103 (1989); H.R. 3030, 101st Cong., 1st Sess. § 101(a)(1) (adding § 110(e)(2) to Clean Air Act) (1989); S. 1490, 101st Cong., 1st Sess. § 101(a) (adding § 110(e)(2) to Clean Air Act) (1989). One bill would allow EPA nine months to act on certain SIP revisions. H.R. 2323, 101st Cong., 1st Sess. § 401 (1989).

[6] S. 1630, 101st Cong., 1st Sess. § 104(b) (1989) is typical. It provides:

> SAVINGS CLAUSES AND ENFORCEABILITY OF PLANS.—Section 110(d) of the Clean Air Act is amended by adding the following at the end thereof: "Such term includes any portion of an implementation plan which has been submitted by a State and approved by the Administrator. Notwithstanding any other provision of this Act, each provision of such implementation plan (and each permit in effect under such plan) shall remain in effect, and shall be enforced under this Act, until a revision of such plan is approved by the Administrator or a plan is promulgated by the Administrator under subsection (c)."

Similar provisions are contained in H.R. 99, *supra*, (§ 303(f)) and in H.R. 2323, *supra* (§ 608(e)).

[7] In addition, EPA has recently made a number of administrative changes in its SIP review process which should

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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result in more expeditious decisions on SIP revision proposals. 54 Fed. Reg. 2214 (1989). These developments are likely to decrease, but probably will not eliminate, the number of instances in which EPA can be claimed to have exceeded a time limit. The changes include: review of proposed SIP revisions for completeness against specific criteria, and requiring prompt modification of incomplete submittals; delegation of decision authority to Regional Administrators for SIP actions that are not nationally significant; and providing for "grandfather[ing]" of SIP revisions that were prepared in good faith by a State but which may become deficient because of a change in EPA policy subsequent to state adoption. *Ibid.*

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IN THE

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OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF GENERAL MOTORS CORPORATION

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TABLE OF CONTENTS

	Page
ARGUMENT	2
I. THE CLEAN AIR ACT REQUIRES EPA TO ACT ON SIP REVISIONS WITHIN FOUR MONTHS	2
II. THE DECISION BELOW IGNORES THE POLICIES BEHIND THE FOUR-MONTH RULE	3
III. THE GOVERNMENT'S ARGUMENTS FOR DEFERRING REVIEW ARE UNPERSUASIVE AND SPECULATIVE	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:	Page
American Cyanamid Co. v. *EPA*, 810 F.2d 493 (5th Cir. 1987)	*passim*
Construction Laborers v. *Curry*, 371 U.S. 542 (1963)	7
Cook v. *Hudson*, 429 U.S. 165 (1976)	8
Council of Commuter Organizations v. *Thomas*, 799 F.2d 879 (2d Cir. 1986)	3
Cox Broadcasting v. *Cohn*, 420 U.S. 469 (1975)	7
Duquesne Light Co. v. *EPA*, 698 F.2d 456 (D.C. Cir. 1983)	3
United States v. *Alcan Foil Products*, 694 F. Supp. 1280 (W.D. Ky. 1988), *appeal pending*	3
United States v. *Musingwear*, 340 U.S. 36 (1950)	8
United States v. *National Steel Corp.*, 767 F.2d 1176 (6th Cir. 1985)	3
STATUTES:	
42 U.S.C. § 7410(a)(2)	2
42 U.S.C. § 7410(a)(3)	2
42 U.S.C. § 7410(g)(1)	3

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REPLY BRIEF OF GENERAL MOTORS CORPORATION

The brief filed by respondent admits that there is a conflict in the circuits on the issue presented in the petition and also acknowledges that "the issue is of considerable importance." (U.S. Br. Opp. p. 14). For these reasons, this Court should grant General Motors' petition. The government's suggestion that review by this Court be deferred because further proceedings in the district court or Congress may affect the contours of this case is inappropriate, speculative, and unpersuasive. In fact, the government's stubborn refusal to admit that it has any statutory

duty to act on revised state plans within four months—a position rejected by the court below, as well as other courts—underscores the need for prompt review by this Court.

This reply brief will address the government's position on the four-month rule, the merits of the enforcement bar in *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (5th Cir. 1987), and the need for Supreme Court review of the issue at this time.

ARGUMENT

I. THE CLEAN AIR ACT REQUIRES EPA TO ACT ON SIP REVISIONS WITHIN FOUR MONTHS.

In the decision below, the First Circuit agreed with the rule adopted in three other circuits and held that EPA must approve or disapprove a SIP revision within four months. (Pet. App. 11a-12a). There is a conflict in the circuits over the enforcement consequences of EPA's violation of the four-month rule, but there can be little doubt that Congress wanted EPA to act expeditiously. Nonetheless, the government attempts to argue against the four-month rule, despite the weight of authority against EPA's position and the fact that the government has not sought review of that issue in this Court.

Section 110(a)(2) of the Act, which contains a detailed list of substantive and procedural requirements for SIP approvals, contains an explicit four-month time limit for EPA action on SIPs. 42 U.S.C. § 7410(a)(2). Section 110(a)(3) of the Act states that EPA shall act on SIP revisions in the same manner as it acts on original SIPs. 42 U.S.C. § 7410(a)(3). All of the courts that have considered the issue in detail have held that EPA must act on SIP revisions in four months, *American Cyanamid*, *supra* at 495;

Duquesne Light Co. v. *EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983); *Council of Commuter Organizations* v. *Thomas*, 799 F.2d 879, 888 (2d Cir. 1986); *United States* v. *Alcan Foil Products*, 694 F. Supp. 1280 (W.D. Ky. 1988), *appeal pending*.[1] This interpretation is also supported by the language of § 110(g)(1) of the Act, 42 U.S.C. § 7410(g)(1), which requires EPA to act on certain temporary suspensions "within the required four-month period."

II. THE DECISION BELOW IGNORES THE POLICIES BEHIND THE FOUR-MONTH RULE.

The government unpersuasively argues that the *Cyanamid* holding was properly rejected by the court below. (U.S. Br. Opp. p. 11). First, the public is not harmed if EPA cannot enforce the existing standard. There was no detriment to the environment in this case—indeed, the long-term emissions from GM's Framingham plant were reduced substantially through construction of a new paint facility at a cost of $200 million. That the short-term emissions did not present a problem is shown by EPA's own actions: although the deadline elapsed in December 1985, EPA did not bring this enforcement action until August 1987, after the old paint facility was shut down. The government ignores this fact. Moreover, the public's interests in clean air are represented by the Commonwealth of

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[1] The government cites a dictum in *United States* v. *National Steel Corp.*, 767 F.2d 1176, 1182 n.1 (6th Cir. 1985). In that case, the parties to a consent decree had agreed that defendant could apply for a SIP revision, but that such an application would not delay the requirements of the decree. (*Id.* at 1179). The four-month rule was thus immaterial. The Sixth Circuit is currently considering whether to recognize the four-month rule and the *Cyanamid* enforcement bar. *See U.S.* v. *Alcan Foil*, *supra*; U.S. Br. Opp. p. 9, n.2.

Massachusetts, which decided that giving GM an extension of time to install a new, lower-emitting paint shop was in the interest of the people of Massachusetts.

The government incorrectly argues that the alternative remedies suggested by the First Circuit ensure that the interests of the state are protected. (U.S. Br. Opp. at 11-12). GM is entitled to raise the issue of EPA's inaction directly in response to the government's suit for penalties, however, and cannot be relegated to collateral, expensive and less effective alternate remedies.[2] Moreover, the government does not address the primary rationale for the *Cyanamid* decision—the need to give EPA incentives to respect the four-month rule in order to avoid infringement on the states' right to timely consideration of SIP revisions. EPA's policy of ignoring SIP revisions results in unilateral federal regulation, contrary to the primary state role intended by Congress. Since EPA has the power to act on a SIP revision whenever it chooses, the bar on enforcement under *Cyanamid* is one that EPA can only create for itself.[3]

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[2] A company's ability to contest a final EPA decision disapproving a SIP revision in the court of appeals does not address Agency inaction as involved in this case, nor may a circuit court action readily allow for discovery as to the existence of bias and the commingling of rulemaking and enforcement functions. Moreover, the court in *Cyanamid* properly rejected the suggestion that a company should be relegated to a mandamus action to force EPA to act. 810 F.2d at 501, n.11.

[3] For this reason, the government's arguments concerning the nature of the court's role (U.S. Br. Opp. p. 13) misses the mark. The court in *Cyanamid* was giving effect to the four-month rule in the statute and express congressional policy concerning the role of the states under the Act.

The concern that EPA delay could undermine even-handed administration of the Act is more than a "speculative possibility" in this case.[4] (U.S. Br. Opp. p. 11). EPA's final disapproval was issued on the day the government's brief was filed in the First Circuit—timing that can hardly have been a coincidence. EPA had every reason to disapprove the revision, which had become moot by EPA's inaction for all purposes except the enforcement suit that was on appeal.

The government also unpersuasively suggests that the *Cyanamid* enforcement bar may encourage industries to propose last-minute SIP revisions for the purpose of delaying EPA enforcement actions. (U.S. Br. Opp. p. 12). The government's suggestion that the states cannot be trusted to meet their obligations under the Act should be rejected out of hand. There is no reason to think that industries will apply for frivolous SIP revisions, and even less reason to think that the states will grant them. Moreover, as noted above, EPA always has the trump card: it can identify and promptly (within four months) disapprove any revisions it believes are improper. The *Cyanamid* rule merely requires EPA to respect the states' role under the Act.[5]

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[4] Although Congress may have provided for enforcement and SIP review functions in the same agency (U.S. Br. Opp. p. 12), Congress certainly did not intend that EPA's SIP decisions be biased by improper commingling of regulatory and enforcement functions.

[5] The government erroneously suggests that GM obtained some economic advantage by waiting until shortly before the deadline to propose a compliance plan. (U.S. Br. Opp. p. 12, n.3). This argument misstates the facts. The 1981 EPA policy on which the revision was based does not contain a deadline for such SIP

III. THE GOVERNMENT'S ARGUMENTS FOR DEFERRING REVIEW ARE UNPERSUASIVE AND SPECULATIVE.

Although admitting that the decision below conflicts with the *Cyanamid* case and that "the issue is of considerable importance" (U.S. Br. Opp. p. 14), the United States urges that the issue not be reviewed "at this time." First, the government suggests that the remand to the district court may possibly clarify the interests at stake and the practical aspects of the decision below. We must respectfully disagree. The First Circuit held that EPA's failure to act in four months, as required by statute, did not bar enforcement. The Fifth Circuit in *Cyanamid* held that such an enforcement action could not proceed. The fact that a district court, under the First Circuit's new rule, could reduce the penalties as it sees fit for various reasons (including the reasonableness of EPA's delay and prejudice to GM) does not change the fact that a square conflict exists in the circuits on an important issue.

Delay of review by this Court will leave the states, GM and other companies operating under the shadow of an unlawful EPA enforcement policy. A review of the equities by the district court will do nothing to further focus on the legal issues raised by this petition. Waiting years to learn the amount of fine that may

revisions. In 1984, GM submitted a timely request under the policy to install controls on its existing paint facility. It is ironic that the government is criticizing GM for changing its approach in 1985 in order to adopt an environmentally superior strategy. It is also ironic that the government suggests that GM was seeking an economic advantage when it spent $200 million to install a new paint shop, many times more than would be required simply to install controls on its old paint facilities.

be imposed by the district court, and then requiring GM to appeal again, will entail burdensome litigation which will not serve to clarify the interests at stake. These interests center on the right of the states to have their SIP revisions considered in a timely manner, so that they may fulfill their role under the Act to develop and implement their policy choices as to the most desirable and practical means to meet air quality goals. These state interests are frustrated by EPA's refusal to recognize the four-month rule and its position that the government can ignore SIP revisions and proceed to enforce original SIPs. These state interests are adversely affected by EPA's disdain for state prerogatives—not by the size of the fine that may be imposed on GM in this case, or on other companies in other cases.[6]

The government also notes that Congress currently is considering Clean Air Act amendments. It is noteworthy that the Administration's proposed Clean Air Act bill (which parallels H.R. 3030) would not change the *Cyanamid* rule because it does not authorize EPA to enforce an existing SIP until a proposed SIP revision is approved.[7] Certainly the possibility that legislation will have a significant impact on the issue raised in this case is speculative and remote. Such a possibility thus should not have

[6] *See Cox Broadcasting* v. *Cohn*, 420 U.S. 469, 477 (1975); *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963) (Supreme Court review is appropriate even where further proceedings are to come in lower courts).

[7] It is ironic that the government claims Congress may address the four-month rule (which the government denies exists) and the *Cyanamid* holding, but that these issues should not be addressed by this Court. *See* U.S. Br. Opp. pp. 9, 14.

any bearing on the need for prompt review of the important question presented in this case.[8]

CONCLUSION

For the foregoing reasons, and the reasons in GM's initial petition, a writ of *certiorari* should be granted.

Respectfully submitted,

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[8] In the unlikely event that intervening legislation were to eliminate the issue presented here, the remedy would be to dismiss the writ or to remand for consideration of possible mootness. *United States* v. *Musingwear*, 340 U.S. 36, 39 (1950); *Cook* v. *Hudson*, 429 U.S. 165 (1976).

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE	3
A. The Central Role Of The States In Implementing The Act	3
B. The Decision Below	4
REASONS FOR GRANTING THE PETITION	7
I. Supreme Court Review Will Resolve This Conflict In The Circuits And Provide Certainty To Companies Regulated Under The Clean Air Act	7
II. Supreme Court Review Will Answer Important Recurring Questions Concerning State Plans Under The Clean Air Act	10
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page
Alabama Power Co. v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979)	11
American Cyanamid Co. v. *EPA*, 810 F.2d 493 (5th Cir. 1987)	*passim*
Bethlehem Steel Corp. v. *EPA*, 782 F.2d 645 (7th Cir. 1986)	11
Bethlehem Steel Corp. v. *Gorsuch*, 742 F.2d 1028 (7th Cir. 1984)	11
Indiana & Michigan Elec. Co. v. *EPA*, 733 F.2d 489 (7th Cir. 1984)	11
Sierra Club v. *Indiana-Kentucky Elec. Corp.*, 716 F.2d 1145 (7th Cir. 1983)	12
Train v. *Natural Resources Defense Council*, 421 U.S. 60 (1975)	4, 11
Statutes	
42 U.S.C. § 7407(a) (1982)	3
42 U.S.C. § 7410(a)(2) (1982)	3, 12
42 U.S.C. § 7401(a)(3) (1982)	3, 11
42 U.S.C. § 7410(c) (1982)	3
42 U.S.C. § 7410(d) (1982)	12
42 U.S.C. § 7607(b) (1982)	3
42 U.S.C. § 7607(d) (1982)	3
Adminitrative Actions	
46 Fed. Reg. 51386 (1981)	4

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

On behalf of its member companies, the Chamber of Commerce of the United States ("the Chamber") submits this brief *amicus curiae* in support of General Motors Corporation's petition for a writ of *certiorari* in the above case.[1] The Chamber is the largest federation of business organizations and individuals in the United States. Its membership includes over 180,000 corporations, partner-

[1] This brief is filed with the written consent of the parties, pursuant to Supreme Court Rule 36.1. Letters of consent are on file with the Clerk of the Court.

ships and proprietorships, as well as several thousand trade and professional associations, and state and local chambers of commerce. The Chamber regularly represents the interests of its membership—which reflects the diversity of American industry and includes companies of all sizes and types—before this Court on important environmental issues of national concern to business.[2]

The question before the Court in this case is whether the United States may bring an enforcement action seeking compliance with an outdated state Clean Air Act implementation plan where EPA has failed to act to approve or disapprove a revised state plan within four months as required by the Act. This case raises fundamental issues concerning the proper roles of the federal government and the states in the establishing and implementing State Implementation Plans ("SIP") under the Clean Air Act. The issues presented go to the heart of the ability of states to make ongoing policy choices as to air pollution control measures, and raises legal and practical questions of vital interest to the Chamber and its members.

The Chamber is committed to the goals of the Clean Air Act and compliance with its requirements. The Chamber does not believe, however, that Congress intended to allow EPA to blatantly ignore the primary responsibility of the states to assure the attainment of air quality goals. The Chamber is concerned that the First Circuit's decision is contrary to the intent of Congress and creates disincentives for the fair administration of the Act.

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[2] *See e.g.*, Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49 (1987); Tull v. United States, 481 U.S. 412 (1987); Dow Chemical Company v. United States, 476 U.S. 227 (1986); Chemical Manufacturers Association v. Natural Resources Defense Council, 470 U.S. 116 (1985).

STATEMENT OF THE CASE

A. The Central Role Of The States In Implementing The Act.

The Clean Air Act, as adopted in 1970 and revised in 1977, creates an important federal-state partnership. In the 1970 Act, Congress increased federal authority and responsibility for achieving air quality goals. The states were required to attain federally specified air quality standards within particular periods of time. The statute expressly preserves an important principle, however:

> "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . ." 42 U.S.C. § 7407(a).

A central mechanism to implement the Clean Air Act involves the formulation by each state of a plan for the implementation, maintenance, and enforcement of the national air quality standards within each region in the state.[3] Implementation plans are adopted by the states and submitted to EPA for review, and within four months EPA must either approve or disapprove all or part of the plan.[4] A plan validly adopted by a state and approved by EPA is enforceable by both the federal government and the state.

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[3] A state's implementation plan ("SIP") must include emission limitations, schedules for compliance, and such other measures as may be necessary to ensure attainment and maintenance of the national standards. 42 U.S.C. § 7410(a)(2).

[4] 42 U.S.C. § 7410(a)(2), (3). If a state fails to submit a plan within the time prescribed, or submits a plan that the Administrator determines not to comply with the requirements of the Act, the Administrator shall promulgate a plan for that state. 42 U.S.C. § 7410(c). Such an EPA promulgation is subject to notice and comment requirements as well as judicial review, 42 U.S.C. §§ 7607(b) and (d).

It is important to underscore that the Clean Air Act gives EPA no authority to question the wisdom of a state's choices of emission limitations if the plan otherwise satisfies the requirements of the Act. Thus, a state is free to alter or fine tune its air quality program as often as needed to accommodate changing economic, technological or air quality conditions.[5] As this Court emphasized in *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 79 (1975), "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."

B. The Decision Below.

The Commonwealth of Massachusetts adopted regulations requiring the painting operations at General Motors' automobile plant in Framingham to meet certain air emission limits for volatile organic compounds ("VOCs") by December 31, 1985. In October 1981, the U.S. Environmental Protection Agency (EPA) published a policy statement supporting deferral of certain Clean Air Act compliance dates for automobile painting to encourage development of more cost-effective and environmentally beneficial processes. 46 Fed. Reg. 51386 (1981). Pursuant to this policy, the Commonwealth extended the applicable deadline for automobile painting operations to August 31, 1987, and submitted the revised regulations for EPA approval in December 1985.

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[5] States often revise their implementation plans in efforts to resolve source-specific compliance issues, especially where the enforcement of an existing SIP may be highly disruptive to the local economy or inappropriate to changed circumstances. These revisions frequently contain innovative pollution control measures, including the use of more cost-effective alternative technologies and emission trading policies. They also may provide ways to bring companies into compliance without shutting them down immediately. *See* American Cyanamid Co. v. EPA, 810 F.2d 493 (5th Cir. 1987).

The purpose of the extension was to allow General Motors to continue operating the old paint facility until it could construct a $200 million new facility which, in keeping with the deferral policy, uses advanced technology and lower VOC content paint. In compliance with the revised state regulations, General Motors permanently shut down the old paint facility in July 1987, a full month ahead of schedule.

Rather than promptly reviewing the revised SIP within the four-month period required by law,[6] EPA chose to bring an enforcement action seeking penalties and injunctive relief for General Motors' alleged noncompliance with the 1985 deadline in the original regulations. Citing *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (5th Cir. 1987), the District Court granted summary judgment to General Motors, and held that EPA's failure to take final action on the revised regulations in a timely manner bars EPA from obtaining the relief requested.

In *American Cyanamid*, the Fifth Circuit invalidated a nearly identical enforcement action. There, the court held that EPA may not commence an enforcement action seeking penalties for alleged violations of outdated state regulations where EPA had failed to take final action on revised state regulations within four months. The court reasoned that EPA's disregard of "the important role which the state plays in defining authorized emissions" bars EPA from collecting a penalty in such circumstances. 810 F.2d at 500. The court found such a bar to be necessary in order (1) to give effect to the states' prerogatives under the Act to decide what emission limits are appropriate, and (2) to avoid the bias that would inevitably be

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[6] *See* n.4 above. EPA in fact did not take final action until the day it filed its brief in the First Circuit. EPA took the position that the 4-month rule did not apply to SIP revisions, a position rejected by the First Circuit as well as the majority of courts which have considered the issue. *See* Slip Op., General Motors petition, Appx. 9a-12a.

introduced into EPA's SIP review process should the Agency be permitted to bring enforcement actions before deciding whether to approve a SIP revision which would moot the enforcement issues.

In this case, however, the First Circuit reversed the district court and held that EPA may bring an enforcement action against General Motors despite the Agency's failure to act on a SIP within four months as required by statute. The court acknowledged that "Congress clearly was concerned with preserving the states' ability to tailor SIPs to local needs and conditions" and that Congress did not intend "the states' legitimate policy choices to be held hostage to the EPA's schedule."[7] The court below expressly disagreed with the Fifth Circuit's approach in the *American Cyanamid* case, however. The court speculated that EPA will frequently fail to act within four months without citing any factual support for this proposition, and concluded that the *American Cyanamid* enforcement bar was "too drastic" a remedy.[8] Instead, the First Circuit ruled that the enforcement action could be brought, and that General Motors' only remedy for EPA's delay is to urge the trial court to exercise its discretion to reduce the amount of the penalties based on the reasonableness of EPA's delay and the prejudice suffered by the company as a result.[9]

The decision below leaves EPA free to ignore state SIP revisions and to enforce original SIP provisions which no longer reflect state policy choices as to how best to achieve air quality goals. The decision creates no incentives for EPA to act in a timely manner, and will frustrate the ability of states and companies to adopt and implement SIP provisions reflecting changing needs and conditions.

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[7] Slip Op., General Motors petition, Appx. 11a-12a.

[8] *Id.* at 14a.

[9] *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

I. Supreme Court Review Will Resolve This Conflict In The Circuits And Provide Certainty To Companies Regulated Under The Clean Air Act.

The issue presented in this case is whether EPA may bring a suit to enforce existing state implementation plan (SIP) regulations when the state has revised its plan and EPA has taken no action to review the plan for almost two years, well outside the four-month period in the statute. The correct reading of the Clean Air Act, adopted by the district court in this case[10] and the Fifth Circuit in the *American Cyanamid* decision is that EPA may not prosecute a suit for penalties under such circumstances.

The Fifth Circuit addressed the proper remedy for EPA's violation of the four-month rule in detail in *American Cyanamid*. In that case, EPA failed to take action on a SIP revision submitted by the State of Louisiana concerning the manner in which a company could demonstrate compliance with certain emission limitations. Instead, EPA filed an enforcement action more than four months after the SIP revision was proposed for noncompliance with the old SIP requirements.

Stressing the importance of avoiding a situation in which "EPA loses nothing by its contumaciousness," 810 F.2d at 499, and emphasizing the need to give EPA an incentive to respect the four-month rule, the Fifth Circuit held that "EPA may not collect a penalty for the period between (1) four months after a state submits a proposed revision, and (2) the date the EPA finally rejects that revision."[11] 810 F.2d at 500. Since the Notice

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[10] General Motors petition, Suppl. Appx.

[11] The court pointed out that if the SIP revision were ultimately rejected, "American Cyanamid will not benefit 'undeservedly,'"

of Violation had not been issued until some time after the four-month deadline for action on the revision (as in this case), the court held that EPA could not bring an enforcement action against American Cyanamid for any violation of the old SIP that occurred before EPA completed its review of the revision—whether or not EPA ultimately rejected the revision.[12]

The court in *American Cyanamid* also pointed out that EPA's practice of bringing enforcement actions before acting on SIP revisions "may encourage the EPA to reject [SIP] revisions that it should accept." *Id.* at 499. After EPA brings such an enforcement action, it is difficult to see how EPA could act in a disinterested way to approve a SIP revision and thereby rule that the company involved is not subject to enforcement after all. As the Fifth Circuit held, such a situation contains a built in conflict which threatens to undermine "EPA's even-handed administration of the Act." *Id.*

The equitable and policy implications of the First Circuit's decision should also be noted. There was no significant detriment to the environment involved in this situation—indeed, the long-term emissions from the Framingham plant were actually reduced through the con-

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since the state had undertaken to authorize its method of compliance and "[i]f the EPA collects less than it could collect retroactively . . . it is because of its own failure to act within the time limits set by the Act." *Id.* at 501.

[12] The Fifth Circuit also rejected the position adopted by the First Circuit in this case (General Motors petition, Appx. 14a) that a remedy for addressing EPA's failure to complete its review in four months is a suit in the district court to require EPA to act:

> "The EPA must review a revision within four months whether or not the state or some other party sues to hasten its decision. A suit to force the agency to act is one remedy, but should not be the only remedy for delay, once the interests of the states themselves are recognized." (810 F.2d at 501 n.11).

struction of a new paint facility that has lower emissions than the old one would have had even with planned controls.[13] That the emissions authorized in the short term under the SIP revision did not present a serious environmental problem is demonstrated by EPA's own actions: although the deadline the Agency seeks to enforce lapsed in December 1985, the Agency did not even bring this enforcement action until August 1987, after the old paint facility was already closed.[14] This fact defeats any suggestion that precluding enforcement is for some reason "inequitable" in this case.

Moreover—and of greater importance—if EPA believed that the old paint facility presented an environmental threat, the Agency could have made enforcement action possible at any time simply by acting on the SIP revision. In this sense, as the district court pointed out, EPA always held "the ultimate trump card." (General Motors Suppl. Appx. at SA-6). The only thing that ever stood in the Agency's way was its own deliberate decision to ignore the four-month rule and the SIP revision and to proceed instead with enforcement. At the same time, by failing to act on the SIP revision, EPA deprived the state of its own right to explore regulatory alternatives and to adopt a form of its SIP that could meet national standards in a manner the state deemed to be most consistent with its interests and with the interest of its citizens. Such a result, if permitted to continue, would

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[13] It was, presumably, this consideration that led the Commonwealth to promulgate the SIP revision in the first place. *See* p. 4, *supra*.

[14] If EPA is as concerned as it claims to be about limited resources and the appropriate ordering of priorities, it is difficult to understand why EPA cannot allocate the resources to review SIP revisions in a timely manner but can find the resources that bring enforcement actions against permanently closed facilities that may never have been out of compliance at all.

be both inequitable and directly contrary to the policy of the Clean Air Act.[15]

II. Supreme Court Review Will Answer Important Recurring Questions Concerning State Plans Under The Clean Air Act.

In construing the Clean Air Act, federal and state judicial review and enforcement cannot be regarded as independent and unrelated instruments of justice. The First Circuit's decision fails to appreciate the fundamental need to assure that the objectives of the Clean Air Act will be attained through coordinated federal and state actions, and in a manner consistent with the primary role of the states.

It must be emphasized that SIPs implementing the Clean Air Act are not static. State agencies must revise their program periodically to accommodate a variety of circumstances, including new air quality data, changing economic and technological conditions, and revised state policies and programs. State SIP revisions, such as the revision involving General Motors in Massachusetts, can address specific air control issues in an innovative way resulting in increased air pollution control.

Congress anticipated that the states would be revising their SIPs periodically. Section 110(a)(3) of the Act

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[15] As emphasized in the American Cyanamid decision:

> "It distorts the statutory scheme to place virtually full emphasis upon the business entity involved as a charged 'polluter.' The emphasis of the statute, rather, is upon the important role which the state plays in defining authorized emissions. . . . The issue then is not so much pollution by American Cyanamid but the default of the EPA in carrying out the congressional intent to work in close cooperation with the states in implementing standards and enforcing the Clean Air Act." *Id.* at 500.

Delay on the part of EPA should not hamper the state's right and duty to regulate and protect its own citizens as it sees fit.

allows the states to adopt plan revisions, and provides that EPA may review such revisions on the same basis as the initial state plans. 42 U.S.C. § 7410(a)(3). This Court specifically underscored the importance of the section 110(a)(3) authority of states to revise SIPs to effectuate their ongoing policy choices:

> "[T]he revision section is to all appearances the mechanism by which the States may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards." (*Train* v. *NRDC*, *supra*, 421 U.S. at 80).

Under EPA's theory, the government can simply ignore a state's policy choices and statutory authority to select whatever mix of emission limits will achieve the national standards. The EPA believes that it can ignore a SIP revision indefinitely, if it chooses to, and bring a suit to enforce the original state plan. Instead of deferring to states' choices of control strategies, the Agency exercises the equivalent of a "pocket veto" over state implementation decisions, a result clearly not contemplated by the statute. *See, Bethlehem Steel Corp.* v. *EPA*, 782 F.2d 645, 650 (7th Cir. 1969).[16]

Conflicting federal and state requirements will necessarily result from prolonged EPA inaction. State plan

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[16] Courts have previously rejected similar exercises of unilateral federal regulations through failure to take timely action. *See, e.g.*, Indiana & Michigan Electric Co. v. EPA, 733 F.2d 489, 492 (7th Cir. 1984) (EPA may not delay action on a key provision of a plan if such delay has the effect of disapproving an integral part of the plan without determining that the part violates the requirements of the Act); Bethlehem Steel Corp. v. Gorsuch, 724 F.2d 1028, 1036 (7th Cir. 1984) (while EPA may approve a regulation in part and disapprove it in part, it may not, under the guise of partial approval, change the substance of the regulation); Alabama Power Co. v. Costle, 636 F.2d 323, 364 (D.C. Cir. 1979) (EPA may not dictate to a state how it will manage internal growth by use of available increments).

revisions are enforceable by the states when adopted.[17] However, SIP revisions are federally enforceable when approved by EPA.[18] During the EPA review period, companies face two different legal requirements, namely the SIP revision under state law and the previous SIP under federal law.[19] That is why Congress placed a premium on prompt EPA review and required final EPA action in four months.

Once one recognizes the important state interests that are affected by EPA's failure to complete its review of a SIP revision in a timely manner, it becomes apparent that one cannot, as the First Circuit suggests, properly deal with the problem through "less drastic" remedies. The district court's decision below persuasively summarized the reasons why barring enforcement under these circumstances is necessary. Noting that EPA would suffer little prejudice from such a rule (since it could remove the bar prospectively at any time simply by acting on the revision), the district court found that failure to apply the bar would substantially prejudice the interests of both the states and affected third parties:

> "[A] period of greater than four months would leave both the states and the affected industries in an unjustifiable state of limbo. For an indefinite period, the state would be unable to act to balance dictated national priorities with the interests of its citizens and industries as the Clean Air Act intended. And the industries themselves, though fully in compliance with state law, would in some instances face the Scylla and Charybdis choice between ceasing operations now, or possibly being forced out of business by heavy fines later." (General Motors Suppl. Appx. at SA 6-7).

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[17] *See* 42 U.S.C. § 7410(a)(2)(B), (D).

[18] *See* 42 U.S.C. § 7410(d).

[19] *See* Sierra Club v. Indiana-Kentucky Electric Corp., 716 F.2d 1145, 1151 (7th Cir. 1983).

The fundamental problem with the approach adopted by the court below is that it provides little or no incentive to EPA to abandon its stubborn determination to ignore its obligation to review SIP revisions on an expedited basis. The decision below will allow such SIP provisions to be subject to conflicting state and federal enforcement, contrary to the intent of Congress and the Fifth Circuit's decision in the *American Cyanamid* case. The conflict in the circuits leaves industrial facilities subject to revised SIP requirements, which are not acted on by EPA in a timely manner, in legal limbo with no clear guidance as to their legal status. A resolution of this conflict by this Court is therefore of critical importance.

CONCLUSION

For the foregoing reasons, General Motors' petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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November 1989

(5)

Supreme Court, U.S.
FILED
JAN 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-369

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1989
CERTIORARI GRANTED DECEMBER 4, 1989

TABLE OF CONTENTS

	Page
A. Relevant Docket Entries, United States Court of Appeals for the First Circuit	1
B. Relevant Docket Entries, United States District Court for the District of Massachusetts	3
C. Relevant Pleadings, Motions, and Exhibits .	7
1. Complaint (August 6, 1987)	7
2. Defendant General Motors Corporation's Motion to Dismiss or in the Alternative for Summary Judgment (September 18, 1987)	14
3. General Motors' Statement of Material Facts as to Which There Is No Genuine Issue to Be Tried (September 18, 1987)	17
4. Affidavit of William J. McFarland (September 16, 1987)	20
a. Exhibit A: Commonwealth of Massachusetts, Office of the Secretary of the Commonwealth, Regulation Filing and Publication Form	25
b. Exhibit B: EPA, "Approval of Revisions to Compliance Schedules for Control of Volatile Organic Compounds from Automobile Assembly Plant Paint Shop Operations," 46 Fed. Reg. 51368 (1981)	30
c. Exhibit C: Letter from David M. Aldorfer to Kenneth A. Hagg (November 20, 1984)	38
d. Exhibit D: Letter from D.M. Aldorfer to James Belsky (June 7, 1985)	41

e. Exhibit E: Commonwealth of Massachusetts, Department of Environmental Quality Engineering, Division of Air Quality Control, "Amendments to Regulation 310 CMR 7.18(7)" (December 30, 1985) 46

f. Exhibit F: Letter from S. Russell Sylva to Michael Deland (with attachments) (December 30, 1985) 50

g. Exhibit G: Letter from Louis F. Gitto to F. James McDonald (with attached "Notice of Violation and Reporting Requirement") (August 14, 1986) 75

5. Affidavit of John L. Hanisch (October 21, 1987) 83

a. Attachment A: Letter from Bruce K. Maillet to Lou Gitto (May 30, 1986) . 89

b. Attachment B: EPA, "Approval and Promulgation of Implementation Plans; Massachusetts; Automobile Surface Coating," 51 Fed. Reg. 43394 (1986) 91

6. Declaration of John J. Silvasi (October 21, 1987) 97

7. Declaration of Bruce A. Armstrong (October 22, 1987) 101

8. EPA, "Guidance on Processing SIP Revisions (And 111(d) Plans)" (excerpts) 103

9. First Amended Complaint 112

D. *United States* v. *General Motors Corp.*, No. 87-2068-Mc (D. Mass. May 16, 1988) 119

NOTICE

The opinion of the United States Court of Appeals for the First Circuit, which is reported at 876 F.2d 1060, is printed in the Appendix to the Petition for Certiorari and is not reprinted here.

A. Relevant Docket Entries, United States Court of Appeals for the First Circuit

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CASE NO. 881799

United States of America,

v.

General Motors Corporation,

Date 1988	Filings—Proceedings.
Aug. 10	Record on appeal in one volume, received and filed. Case docketed and notices mailed. (eml)
.....	
Sept. 20	Brief for appellant and appendix received and filed. Notices mailed.
Oct. 20	Brief for General Motors Corporation, Appellee received and filed. (bf)
Oct. 21	Brief of Amicus Curiae Commonwealth of Massachusetts received and filed. (bf)
Nov. 2	Reply brief for the United States received and filed. (bf)
Dec. 29	Assigned for hearing at the January, 1989 session. (jms)
Jan. 11	Heard before CH. J. Campbell, JJ. Coffin and Torruella. (jms)
June 7	JUDGMENT: The judgment of the District Court is reversed and the cause is remanded to the District Court for further proceedings not inconsistent with the opinion filed this date. Opinion of the Court by Coffin, J. Notices mailed. (lp)

June 21	Itemized and verified bill of costs in favor of the appellant, received and filed. (lp)
June 29	Mandate issued. Copy filed. Taxation of costs filed. Original papers to follow. Notices mailed. (pm)
July 28	Original papers returned to the district court. (pm)
Sept. 12	Notice of filing petition for certiorari to the Supreme Court (89-369) September 5, 1989, received and filed. (cm)
Dec. 7	Order from the Supreme Court granting the petition for writ of certiorari (December 4, 1989) received and filed. (lb)
Dec. 28	Certified copies of proceedings in six volumes sent to the Supreme Court (cm)

B. Relevant Docket Entries, United States District Court for the District of Massachusetts

87-2068-Mc

Date:	Nr.	Proceedings
Aug.17	01	COMPLAINT filed. Summons, 18/ I issued.
8/29/87	02	Consent Mtn for Extension of time within which to file a responsive pleading, up to and including 9/ 18/87, filed.
SEP 4	03	Copy of Letter from Andrew S. Hogeland, AUSA, to Amy Woodward, Esq., dated 9/3/87, filed, with attachment.
SEP 4	04	Letter to court from Amy Woodward as acknowledgment receipt of mail, filed.
....		
SEP 18	07	Deft. GMC Motion to Dismiss or in the Alt. for SJ, filed, c/s.
SEP 18	08	Affidavit of William J. McFarland, filed, c/s.
....		
SEP 25	10	Memo in support of GMC Motion to Dismiss or in the Alt. for Summary Judgment, filed, c/s.
OCT 1	11	Stipulation and Order Extending Time for Response to GMC Motion to Dismiss or for Summary Judgment, filed, c/s.
Oct 20		*McNaught, D.J.* ORDER issued re # 6: Approved by the Court...cc/cl.
....		

OCT 22	14	Pltf's motion to Amend Complaint, filed, c/s.
OCT 22	15	Memorandum of Pltf in Support of Motion to Amend Complaint, FILED, C/S.
....		
OCT 23	17	P's Memo in Oppos. to Motion of GM to Dismiss or in the Alternative foe SJ, filed, c/s.
NOV 4	18	Letter to Ms. Johnson, from Amy Woodward requesting oral argument after 11/16/87 re GM's Motion to Dismiss or for Summary Judgment, filed.
NOV 4	19	Deft's Response to Amended Complaint by GMC, filed, c/s.
NOV 4	20	Deft. Motion for Leave to File Reply memo filed, c/s.
NOV 4	21	Deft's Response to motion for Leave to File Amended Complaint, filed, c/s.
NOV 6	22	File referred to Magistrate Saris re 14 with memo in Support 15 and ##19 and 21 responses to Deft.
NOV 16	23	McNAUGHT, D.J. ORDER referring file to Magistrate issued to parties.
NOV 16	24	McNAUGHT, D.J. File referred to Magistrate Saris for Rule 16(b) Sched. Con. and all pretrial matters.
NOV 16	25	Reply Brief for Deft. GMC in Support of its Motion to Dismiss or in the Alternative for Summary Judgment, filed, c/s.
NOV 13		SARIS, U.S.M. ORDER issued re #14: Allowed....cc/cl.
NOV 13	26	FIRST AMENDED COMPLAINT filed.

NOV 24	27	SARIS, U.S.M. NOTICE OF SCHED. conf. set for 1/5/88 at 12:20 a.m.
DEC 8	28	Motion to Stay Discovery and Proceedings before the Magistrate by Defendant filed, c/s.
DEC 18	29	Stipulation and Order Extending Time for Response to General Motors Corp's Motion to Stay Discovery and Proceedings Before the Magistrate, filed, c/s.
DEC 18	30	Letter to Magistrate Saris from Kenneth A. Reich, filed.
1988		
JAN 4		*SARIS, U.*S.M. Order issued re #29: Stipulation approved....cc/cl.
JAN 5	31	Pltf's Memo in Oppos. to Motion of GM to Stay Discovery and Proceedings Before Magistrate, filed, /s.
....		
JAN 13	33	GM Reply Memo in Response to P's memo in Oppos. to Motion to Stay Discovery and Proceedings Before Magistrate, filed, c/s.
JAN 15		SARIS, U.S.M. Order Issued re #32: Motion Allowed.... cc/cl.
JAN 15	34	SARIS, U.S.M. Notice of Status Conf. and D's Motion to Stay Disc. and Proc. set for Wed. 3/2/88 at 11:20 a.m. issued to parties.
MAR 9	35	Memo to Mary Johnson, Clerks, from Ellen Hayes re Court's consideration of Docket #07, D's Motion to Dismiss; Mag. Saris allowed stay of proceedings pending disposition of motion, filed.

MAR 11	36	MCNAUGHT, D.J. NOTICE OF HEARING set for 5/6/88 at 9:30 a.m. re D's motion #07....issued to all parties.....c/ccl.
.....		
MAY 6	38	Letter to the Court from Atty. Reich, Foley, Hoag, & Eliot re GM pending M/Dismiss or in Alt. for SJ, enclosing slip opinion, filed, c/s.
MAY 6	39	*McNAUGHT, D.J.* Clerks Notes: Counsel appear for hearing on deft's motion to dismiss or for summary judgment. After hearing, Court takes matter under advisement.
MAY 16	40	*McNAUGHT, D.J.* MEMO AND ORDER.....D's Motion for SJ is GRANTED.....cc/cl.
MAY 18		CASE CLOSED.
JUNE 1	40	*McNAUGHT, D.J.* JUDGMENT entered.....In accordance with the Memo and Order dated 5/16/88 granting d's motion for sj, it is hereby ORDERED..... JUDGMENT for the Defendant.....cc/cl.

C. Relevant Pleadings, Motions, and Exhibits

1. Complaint (August 6, 1987)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.
87-2068-MC

UNITED STATES OF AMERICA,
Plaintiff,

v.

GENERAL MOTORS CORPORATION,
Defendant.

COMPLAINT

Plaintiff, the United States of America ("United States"), at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges as follows:

NATURE OF ACTION

1. This is a civil action pursuant to Section 113(b) of the Clean Air Act ("the Act"), 42 U.S.C. § 7413(b), seeking civil penalties for emissions of volatile organic compounds ("VOC") in violation of the Massachusetts State Implementation Plan and the Act and injunctive relief to abate such emissions.

JURISDICTION AND VENUE

2. This court has jurisdiction over the subject matter of this action pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1331, 1345, and 1355.

3. Venue is proper in this District pursuant to 42 U.S.C. § 7413(b) and 28 U.S.C. § 1391(b) and (c) because the alleged violations took place in the District of Massachusetts and because the Defendant is licensed to do business and is doing business in Massachusetts.

4. Authority to bring this action on behalf of the EPA Administrator is vested in the United States Department of Justice pursuant to Section 305 of the Act, 42 U.S.C. § 7605.

5. Notice of the commencement of this action has been given to the Massachusetts Department of Environmental Quality Engineering ("DEQE") in accordance with Section 113(b) of the Act, 42 U.S.C. § 7413(b).

DEFENDANT

6. Defendant, General Motors Corporation ("General Motors"), is a Delaware corporation authorized to do business in Massachusetts, with its principal place of business in Detroit, Michigan. General Motors is a "person" as defined in Section 302(e) of the Act, 42 U.S.C. § 7602(e).

7. General Motors owns and operates an automobile assembly and painting facility located in Framingham, Massachusetts (the "Framingham plant"). From at least 1980 to the present, automobiles have been painted at the Framingham plant by a process that includes a topcoating step and, when necessary, a final repair coating step. The topcoatings and final repair coatings that have been and continue to be used at the Framingham plant contain VOCs which are emitted into the atmosphere during the surface coating process.

STATUTORY AND REGULATORY FRAMEWORK

8. Section 109(a) of the Clean Air Act, 42 U.S.C. § 7409(a), requires the Administrator of EPA ("the Administrator") to promulgate primary and secondary National Ambient Air Quality Standards ("NAAQS") for any air pollutant for which air quality criteria are issued. The primary standard must be designed "to protect the public health" with "an adequate margin of safety." 42 U.S.C. § 7409(b)(1). The secondary standard must be sufficient "to protect the public welfare from any known or anticipated adverse effects" of the pollutant. 42 U.S.C. § 7409(b)(2).

9. On February 8, 1979, the Administrator promulgated, pursuant to Section 109, a combined primary and secondary NAAQS for the photochemical oxidant known as ozone, which standard is codified at 40 C.F.R. § 50.9.

10. To achieve the NAAQS for ozone, Section 110(a) of the Act, 42 U.S.C. § 7410(a), requires each State to promulgate and submit to EPA for approval a State Implementation Plan ("SIP") containing regulations for reducing emissions of air pollutants from sources within the State that contribute to ozone formation. Each SIP is federally enforceable, if approved. Each SIP is to achieve and maintain the NAAQS within an established time limit, 42 U.S.C. § 7410, which in most cases must be no later than December 31, 1982, and may not in any case be later than December 31, 1987, 42 U.S.C. § 7502. In addition, each SIP applicable to a "nonattainment area"—an area where EPA has determined that an air pollutant exceeds the NAAQS for that pollutant—must require such reductions in emissions from existing sources of the pollutant in the area as may be achieved through the adoption of, at a minimum, reasonably available control technology. 42 U.S.C. § 7502(b)(2).

11. The entire state of Massachusetts is a nonattainment area for the primary ozone NAAQS. *See* 40 C.F.R. § 81.322. VOCs are an "air pollutant," as defined in Section 302(g) of the Act, 42 U.S.C. § 7602(g), that contributes to ozone formation.

12. Massachusetts, through its DEQE, has promulgated regulations codified at 310 CMR 7.18(7) which limit VOC emissions from automobile surface coating lines. In the form approved by EPA on September 16, 1980, *see* 45 Fed. Reg. 61293, 61295 (copy attached as Exhibit 1), and as amended effective November 9, 1983, *see* 48 Fed. Reg. 51480, 51482 (copy attached as Exhibit 2), these regulations (hereinafter the "automobile coating SIP provisions") are incorporated in the Massachusetts SIP.

13. The Massachusetts automobile coating SIP provisions provide in part:

> (7) *U Automobile Surface Coating.* No person owning, leasing, or controlling the operation of any automobile assembly plant shall cause, allow, or permit emissions therefrom in excess of those emission limitations set forth in the following table and within the time schedules specified in the following table.

Table 5
Emission Limitations
Automobile Surface Coatings

U Volatile Organic Compounds

Emission Source	*Emission Limitations* Lbs. of volatile organic compounds per gallon of coating (excluding water) at application	*Compliance Date* Achieve Full Compliance with emission limitation
Topcoat application, flash off area, and oven	5.8*	By December 31, 1979
	5.0*	By December 31, 1982
	and 2.8*	By December 31, 1985
Final repair application, flash off area, and oven	4.8*	By December 31, 1985

* *Note:* Compliance with these emission limitations shall be based upon an arithmetic average of topcoat coatings and final repair coatings.

14. The Massachusetts automobile coating SIP provisions, as federally approved, apply and at all relevant times

have applied to the topcoat and final repair coating lines at General Motors' Framingham plant.

CLAIM FOR RELIEF

15. General Motors owns and operates automobile topcoat lines and a final repair coating line at the Framingham Plant which are subject to the Massachusetts automobile coating SIP provisions. VOC emissions from coatings on these lines have exceeded the emission limits in the automobile coating SIP provisions during virtually every day the lines have been in operation from January 1, 1986 to the present. There is no pollution control equipment operating on these lines to control VOC emissions.

16. Under Section 113(a) of the Act, 42 U.S.C. § 7413(a)(1), if the Administrator of EPA finds a person to be in violation of an applicable SIP, the Administrator shall notify the person and the state in which the SIP applies. If the violation extends beyond the thirtieth day after the date of the Administrator's notification, the Administrator may bring a civil action under Section 113(b)(2) of the Act for injunctive relief, civil penalties of up to $25,000 per day of violation, or both.

17. On August 14, 1986, EPA issued General Motors a Notice of Violation under Section 113(a) of the Act, 42 U.S.C. § 7413(a), citing violations of the Massachusetts automobile coating SIP provisions on the topcoat and final repair coating lines at the Framingham plant. EPA sent a copy of the Notice of Violation to the Massachusetts DEQE pursuant to Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1).

18. General Motors received the Notice of Violation on August 18, 1986.

19. After September 17, 1986, VOC emissions from coatings used on the topcoat and final repair coating lines at the Framingham plant have continued to exceed the emis-

sion limits set forth in the Massachusetts automobile coating SIP provisions.

20. General Motors has, therefore, violated the Massachusetts automobile coating SIP provisions and Section 113 of the Act, 42 U.S.C. § 7413. General Motors will continue to operate the topcoat and final repair coating lines at the Framingham Plant in violation of the automobile coating SIP provisions and Section 113 of the Act unless restrained by order of this Court.

WHEREFORE, Plaintiff, United States of America, respectfully prays that this Court enter judgment against Defendant for:

(a) A permanent injunction restraining and preventing Defendant from operating the topcoat and final repair coating lines at the Framingham Plant in violation of the Massachusetts automobile coating SIP provisions and the Act;

(b) Civil penalties of up to $25,000 for each day on which Defendant has operated the topcoat and final repair coating lines at the Framingham Plant in violation of the Massachusetts automobile coating SIP provisions;

(c) Plaintiff's costs of this action; and

(d) Such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

/s/ Roger J. Marzulla
Roger J. Marzulla
Acting Assistant Attorney General
Land and Natural Resources Division

/s/ William D. Brighton
William D. Brighton, Trial Attorney
Environmental Enforcement Section
Land and Natural Resources Division
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Boston, Massach setts 02203

2. Defendant General Motors Corporation's Motion to Dismiss or in the Alternative for Summary Judgment (September 18, 1987)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 87-2068 MC

UNITED STATES OF AMERICA,
Plaintiff,

v.

GENERAL MOTORS CORPORATION,
Defendant.

DEFENDANT GENERAL MOTORS CORPORATION'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Defendant General Motors Corporation moves the Court pursuant to Rules 12(b)(1) and (6) and 56 of the Federal Rules of Civil Procedure for an order of dismissal or, in the alternative, for summary judgment. The grounds of this motion are that the complaint failed to state a claim upon which relief can be granted, and the Court does not have subject matter jurisdiction.

In the alternative, General Motors submits that there are no genuine issues to be tried as to any material fact, and defendant is entitled to summary judgment as a matter of law.

In support of this motion, defendant General Motors submits the accompanying memorandum, affidavit of William J. McFarland with exhibits, and a statement of material facts as to which there is no genuine issue to be tried.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 17(c) of the Rules of this Court, defendant General Motors Corporation requests oral argument on this motion. Because of the important issues of federal-State relationships involved in this case, and the impact on General Motors of the pendency of this suit, we request that argument be scheduled as soon as the business of this Court permits after briefing is completed on this motion.

Respectfully submitted,

/s/ Theodore L. Garrett
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Attorneys for General Motors Corporation

Of Counsel:

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General Motors Corporation
New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

September 18, 1987

3. General Motors' Statement of Material Facts as to Which There Is No Genuine Issue to Be Tried (September 18, 1987)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 87-2068 MC

UNITED STATES OF AMERICA,
Plaintiff,

v.

GENERAL MOTORS CORPORATION,
Defendant.

GENERAL MOTORS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Pursuant to Rule 18 of the Local Rules of this Court, defendant General Motors Corporation (GM) submits the following statement of material facts as to which there is no genuine issue to be tried:

1. GM owns and operates an automobile assembly plant in Framingham, Massachusetts—the only automobile assembly plant in Massachusetts. Among the operations at the Framingham plant are automobile painting. Complaint ¶ 7.

2. In May 1979, the Commonwealth of Massachusetts promulgated a regulation, 310 CMR 7.18(7), limiting emissions of Volatile Organic Compounds (VOCs) from automobile surface coating, including topcoat and final repair painting operations. The original final compliance date in

this regulation for these operations was December 31, 1985. Complaint ¶¶ 12, 13.

3. On October 20, 1981, EPA published a Clean Air Act policy statement allowing for the deferral of the compliance dates in State Implementation Plan (SIP) regulations for automobile painting operations. 46 *Fed. Reg.* 51386 (1981). (A copy of this EPA policy notice is attached as Exhibit B to the Affidavit of William J. McFarland.)

4. In 1984, GM requested an extension to December 31, 1987, of the compliance deadline for its Framingham topcoat and final repair paint operations. GM's 1984 request to the Commonwealth was based on proposed abatement controls of its then-existing lacquer painting facilities. (A copy of GM's November 20, 1984 request is attached as Exhibit C to the McFarland Affidavit).

5. On June 7, 1985, GM informed the Commonwealth of its plans to comply by replacing the existing topcoat and final lacquer operations with a new lower-emitting basecoat/clearcoat (BC/CC) enamel paint system. GM stated that an extension of time until December 31, 1987, was needed to allow construction of the new painting facilities. (A copy of GM's June 7, 1985 letter is attached as Exhibit D to the McFarland Affidavit.)

6. Following a public hearing, the Commonwealth of Massachusetts took final action on December 30, 1985, amending 310 CMR 7.18(7) to extend the topcoat and final repair automobile paint compliance deadline to August 31, 1987. (A copy of this amendment is attached as Exhibit E to the McFarland Affidavit.)

7. On December 30, 1985, the Commonwealth of Massachusetts submitted 310 CMR 7.18(7) to EPA for approval as a revision to the State Implementation Plan (SIP). (A copy of this December 30, 1985, SIP revision is attached as Exhibit F to the McFarland Affidavit.)

8. GM continued to operate its then-existing topcoat and final repair lacquer paint facilities until July 7, 1987, when these paint facilities were permanently shut down. McFarland Affidavit, ¶ 13.

9. At the time this suit was filed by the United States on August 17, 1987, and to the present date, EPA has taken no final action on the SIP revision to 310 CMR 7.18(7) submitted by the Commonwealth on December 30, 1985. *Id*, ¶ 14.

Respectfully submitted,

/s/ Theodore L. Garrett
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Patrick J. McCarroll
Legal Staff
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New Center One Building
3031 West Grand Boulevard
Detroit, Michigan 48232

September 18, 1987

4. Affidavit of William J. McFarland (September 16, 1987)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 87-2068 MC

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MOTORS CORPORATION,

Defendant.

City of Detroit)
County of Wayne) s.s.:
State of Michigan)

AFFIDAVIT OF WILLIAM J. McFARLAND

William J. McFarland, being duly sworn, deposes and states as follows:

1. I am a development engineer for the General Motors Corporation Environmental Activities Staff in Warren, Michigan. My responsibilities include advice and assistance to GM in connection with compliance with federal and state environmental requirements.

2. This affidavit is submitted in connection with *United States of America* v. *General Motors Corporation*, USDC D. Mass., Civil Action No. 87-2068 MC. I have personal knowledge of the facts relating to this action.

3. GM owns and operates an automobile assembly plant in Framingham, Massachusetts—the only automobile assembly plant in Massachusetts. The assembly process at

the plant includes the painting of newly-assembled automobiles. Topcoat and final repair are two painting operations performed at the plant.

4. In 1979, the Commonwealth of Massachusetts promulgated a regulation, 310 CMR 7.18(7) limiting Volatile Organic Compound (VOC) emissions from automobile painting operations, including topcoat and final repair. These emission limits were intended to reflect "Reasonably Available Control Technology" (RACT). 42 U.S.C. 7502(b)(3). The original final compliance date in this regulation for topcoat and final repair operations was December 31, 1985. A copy of these regulations is attached as Exhibit A.

5. On October 20, 1981, EPA published a policy statement for the deferral of the RACT compliance dates in State Implementation Plans (SIP) for automobile painting operations. 46 *Fed. Reg.* 51386 (1981). The policy states that compliance dates for automobile paint emission limits may be deferred by the states until 1987 so that an orderly national implementation effort to achieve final RACT compliance could be followed. EPA noted that the automobile industry was developing new lower-emitting coatings, including basecoat/clearcoat (BC/CC), and that granting a deferral would give the industry necessary time to allow more cost-effective techniques to be developed. The policy indicated that EPA would be willing to approve state SIP revisions deferring compliance deadlines up to 1987. A copy of this EPA policy is attached as Exhibit B.

6. Pursuant to EPA's October 20, 1981 policy statement, GM requested of the Commonwealth an extension to December 31, 1987 of the topcoat and final repair compliance deadline for its Framingham paint operations. GM's initial compliance proposal to the Commonwealth was based on proposed abatement control of its then-existing lacquer painting facilities. A copy of GM's November 20, 1984 request is attached as Exhibit C.

7. On June 7, 1985, GM informed the Commonwealth of its plans to comply by replacing the then-existing lacquer painting operations at Framingham with a new, lower emitting BC/CC enamel paint system. GM noted that the new paint system would enable the plant to produce vehicles with a finish quality competitive in the world market. GM stated that an extension of time until December 31, 1987, was needed to allow for construction of the new painting facilities. A copy of GM's June 7, 1985 letter is attached as Exhibit D.

8. On December 16, 1985, the Commonwealth of Massachusetts Department of Environmental Quality Engineering (DEQE) held a public hearing on its proposed revision of 310 CMR 7.18(7) to extend the topcoat and final repair compliance deadline to December 31, 1987. At this hearing, GM requested approval of the proposed revision. An EPA representative, the Chief of EPA State Air Programs Branch, did not oppose the proposed revision but expressed reservations concerning emissions during the extension and limits for the new paint facilities. (See DEQE summary of hearings, included in Exhibit F.)

9. On December 30, 1985, the Commonwealth of Massachusetts took final action amending 310 CMR 7.18(7) to extend the topcoat and final repair compliance deadline to August 31, 1987. This date was based on GM's statement that it would shut down the then-existing lacquer paint operations by August 31, 1987. A copy of this amendment is attached as Exhibit E.

10. On December 30, 1985, the Commonwealth of Massachusetts submitted amended 310 CMR 7.18(7) to EPA for approval as a SIP revision. The Commonwealth's submission included a copy of the public notice, a certification concerning the public hearing, a summary of testimony, a decision memorandum, and the support document for the revision. A copy of this December 30, 1985, SIP revision is attached as Exhibit F.

11. On August 14, 1986, EPA issued a Notice of Violation to GM alleging that the Framingham plant was violating 310 CMR 7.18(7) as approved by EPA in 1980 and 1983. The Notice of Violation does not mention the December 30, 1985 revision of regulation 310 CMR 7.18(7) by the Commonwealth. The Notice of Violation only addressed the then-existing lacquer paint operations; the new BC/CC paint facilities were still under construction and not in operation. A copy of the Notice of Violation is attached as Exhibit G.

12. On September 9, 1986, EPA held a conference with GM on the Framingham Notice of Violation. At the conference, GM maintained it was in compliance with the topcoat and final repair limitations contained in revised 310 CMR 7.18(7). GM stated that this revision was made pursuant to and consistent with EPA's October 20, 1981 policy. Furthermore, GM challenged the validity of the Notice of Violation because of EPA's failure to take final action on revised 310 CMR 7.18(7) within four months as required by the Clean Air Act.

13. Pursuant to revised 310 CMR 7.18(7), GM continued to operate its then-existing topcoat and final repair lacquer paint facilities until July 7, 1987, at which time such facilities were permanently shut down.

14. EPA has taken no final action on the SIP revision to 310 CMR 7.18(7) submitted by the Commonwealth on December 30, 1985.*

/s/ William J. McFarland
William J. McFarland

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* On December 2, 1986, EPA published a proposed disapproval of the SIP revision. 51 *Fed. Reg.* 43394 (1986). EPA's notice states that a deferral should be obtained by an enforcement order rather than a SIP revision. In response, GM and the Commonwealth of Massachusetts submitted comments supporting the validity of the revision and requesting EPA approval.

Sworn and subscribed to before me
this 16th day of September, 1987

/s/ Mary de Freitas
Notary Public

MARY DE FREITAS
Notary Public Oakland County, Mich.
Acting in Wayne County
My Commission Expires December 11, 1990

a. Exhibit A: Commonwealth of Massachusetts, Office of the Secretary of the Commonwealth, Regulation Filing and Publication Form

COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE SECRETARY OF THE COMMONWEALTH

REGULATION FILING AND PUBLICATION FORM

1. REGULATION CHAPTER NUMBER AND HEADING: 310 CMR 7.18: Air Pollution Control Regulations
2. NAME OF REGULATING AGENCY: Department of Environmental Quality Engineering
3. READABLE LANGUAGE SUMMARY: (Categories of persons, organizations, businesses affected, general purposes and requirements of regulation)

These regulation amendments pertain to the control of volatile compounds from certain source categories within the state. Specifically they regulate the emission of hydrocarbons from the following industrial processes: metal furniture coating, metal can surface coating, large appliance surface coating, magnet wire insulation coating, automobile surface coating, and solvent metal degreasing, as well as petroleum marketing.

4. AGENCY CONTACT FOR ADDITIONAL INFORMATION: Vaughan M. Steeves
Address: Room 320, 600 Washington Street, Boston, MA 02111 Phone: 727- 5246
5. PUBLICATION REFERENCE: Register Issue 159 Date: 5/24/79

6. EFFECTIVE DATE: When Published:_____
After Publication On:_____

A TRUE COPY ATTEST
/s/ Michael Joseph Connolly
MICHAEL JOSEPH CONNOLLY
SECRETARY OF STATE
DATE 5/24/79 CLERK C.M.

310 CMR 7.18: AIR POLLUTION CONTROL REGULATIONS

Volatile Organic Compounds

Section 7.18 U Volatile Organic Compounds.
(1) U Application.

(a) Section 7.18 in its entirety shall apply to solvent metal cleaning; and facilities which emit volatile organic compounds in the application of surface coating to automobiles, metal cans, metal furniture, large appliances, and insulation of magnet wire.

(b) For the purposes of Section 7.18 in its entirety methane, ethane, 1,1,1-Trichloroethane (Methyl Chloroform), and Trichlorotrifluoroethane (Freon 113) shall be exempt.

(2) U Compliance with Emission Limitations

(a) Persons owning, leasing or controlling the operation of any facility described in 310 CMR 7.18(3), 7.18(4), 7.18(5), and 7.18(6) shall achieve full compliance by July 1, 1980 with the regulatory emission limitation applicable to such facility or take the actions shown below:

1. justify to the Department that additional time is needed, and

2. submit a proposed plan and compliance schedule for said facility to the Department not later than January 1, 1980.

Justification for additional time to comply with regulatory emission limitations, and submittal of proposed plans and compliance schedules are subject to review and approval by the Department and must provide for compliance with applicable regulatory emission limitations as expeditiously as practicable, but in no case later than July 1, 1982.

All compliance schedules for process equipment replacement or modification, or installation of control

equipment shall provide for periodic increments of progress including submittal of engineering plans, ordering of equipment after plan approval, installation date after confirmation of order by the manufacturer, and date by which the applicable regulatory emission limitation will be achieved after equipment is in satisfactory operation.

All compliance schedules based upon reformulation shall provide for periodic increments of progress including submittal of engineering plans, operating and maintenance procedures, schedules for research and development, purchase orders for reformulations, commencement and completion of process modifications, and date by which regulatory emission limitation will be achieved.

(b) Persons owning, leasing or controlling the operation at a specific site location of any individual or combination of coating lines described in 310 CMR 7.18(3) through 7.18(7), may for compliance with 7.18(2)(a) and the emission limitations contained in 310 CMR 7.18(3) through 7.18(7) submit a proposed plan containing a mix of emission limits for such coating lines such that the total emissions from all coating lines is less than or equal to the sum of emissions that would result from each individual coating line complying with the applicable emission limitation contained in 310 CMR 7.18(3) through 7.18(7). Submittal of such a proposed plan is subject to review and approval by the Department and must provide for compliance consistent with Section 7.18(2)(a).

(c) For the purposes of 310 CMR 7.18 in its entirety persons owning, leasing, or controlling any facility shall upon request of the Department perform or have performed, tests to determine compliance in accordance with methods approved by the Department under the provisions of 310 CMR 7.13.

(3) U Metal Furniture Surface Coating. No person owning, leasing, or controlling the operation of any metal furniture coating line shall cause, suffer, allow, or permit emissions therefrom in excess of those emission limitations set forth in the following table and within the time schedules specified in 310 CMR 7.18(2).

(7) **U Automobile Surface Coating.** No person owning, leasing, or controlling the operation of any automobile assembly plant shall cause, suffer, allow, or permit emissions therefrom in excess of those emission limitations set forth in the following table and within the time schedules specified in the following table.

Table 5
Emission Limitations
Automobile Surface Coating
U Volatile Organic Compounds

Emission Source	*Emission Limitations* Lbs. of volatile organic compounds per gallon of coating (excluding water) at application	*Compliance Date* Achieve Full Compliance with emission limitation
Prime application, flash off area, and oven	2.1	By July 1, 1979
	and 1.2	By December 31, 1982
Primer-surfacer application flash off area, and oven	3.0	By December 31, 1980
	and 2.8	By December 31, 1985
Topcoat application flash off area, and oven	5.8*	By December 31, 1979
	5.0*	By December 31, 1982
	and 2.8*	By December 31, 1985
Final repair application flashoff area, and oven	4.8*	By December 31, 1985

Analytical methods for comparison with these limitation must be conducted in accordance with ASTM D 1475-60, and/or ASTM D 1644- 59 (Method A only), and/or ASTM D 2369-73, and/or Federal Standard 141a, Method 4082.1, and/or any other method(s) which has been correlated to the above method(s) to the satisfaction of the Department.

* Compliance with these emission limitations shall be based upon an arithmetic average of topcoat coatings and final repair coatings.

b. Exhibit B: EPA, "Approval of Revisions to Compliance Schedules for Control of Volatile Organic Compounds from Automobile Assembly Plant Paint Shop Operations," 46 Fed. Reg. 51368 (1981)

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AD, FRL 1860-6]

Approval of Revisions to Compliance Schedules for Control of Volatile Organic Compounds From Automobile Assembly Plant Paint Shop Operations

AGENCY: Environmental Protection Agency.

ACTION: Policy statement.

SUMMARY: On April 13, 1981, the Agency published a notice of intent to implement a number of actions to reduce the regulatory burden on the motor vehicle industry. Item 17 in this notice involved exploring with States the deferral of certain compliance dates for paint shop operations.

This notice establishes the criteria the Agency will apply in reviewing modifications to the existing State compliance schedules for these paint shop operations. States are advised that the Agency will consider the following types of revisions to their State Implementation Plan (SIP):

1. For electrophoretic deposition process (EDP) operations—compliance date extensions to 1984 to allow the postponement of significant capital expenditures; deferral up to 1987, if necessary, to implement alternative compliance techniques or if additional time will eliminate significant costs.

2. For prime-surfacer operations—deferral to follow installation of EDP.

3. For topcoat—deferral of compliance with topcoat emission limits until 1986/1987.

The Agency also commits to study in 1984 any specific problems which arise with these topcoat limits and, at that time, will provide additional information to the States for use in evaluating alternative emission limits which may be appropriate. Also, to resolve several areas of confusion in new source review, the Agency provides clarification that lowest achievable emission rate (LAER) and best available technology (BACT) determinations should recognize any innovative technology waivers that are granted and clarifies that offsets need not necessarily be required from a source if reasonable further progress toward attainment can be maintained.

FOR FURTHER INFORMATION CONTACT: John Calcagni, Control Programs Development Division (MD-15), Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone: (919) 541-5663.

SUPPLEMENTARY INFORMATION: The Environmental Protection Agency (EPA) has reviewed the impact of the implementation of regulations to control volatile organic compounds (VOC) from automotive assembly plant paint shop operations. The Agency has concluded that this delay may ultimately result in more cost-effective compliance with these limitations and, in most cases, can be implemented without jeopardizing the attainment of the ambient air quality standard for ozone by the statutory attainment date. EPA has discussed this policy with representatives of the affected States. Where States agree with the Agency's findings and submit revisions of their State Implementation Plans (SIPs) consistent with the criteria discussed below, the Agency will approve these schedules as being as expeditious as practicable. However, it should be noted that SIPs will need to assure continued compliance with the statutory portions of Sections 110 and 172 of the Clean Air Act. These revisions will need to be

evaluated in light of their impact on the overall plan and the individual elements, including emission reductions necessary to demonstrate reasonable further progress toward attainment of standards.

Electrophoretic Deposition Process

Most plants already have plans to install the electrophoretic deposition process (EDP) for priming of vehicles because of its contribution to improved product quality as well as emission control. The majority will be in place by 1982. However, the capital investment to convert from spray prime to this process is quite large (estimated to be $10-$20 million per facility and perhaps significantly greater for some specific situations). Of course, in some instances compliance may be accomplished with techniques or processes not requiring EDP.

Where significant capital expenditures can be deferred through the postponement of the installation of these systems for the next two years, the Agency would find such schedule changes appropriate. Allowing time for installation, the final compliance date generally should not be later than the end of 1984.

In a few specific circumstances such as a plant which is scheduled for renovation or closing in the next few years or a plant applying an alternative compliance technique, significant expense can be eliminated (not just postponed) by the deferral of the present compliance date. In cases where substantial costs can be eliminated, it would be appropriate to allow the auto industry to postpone these expenditures beyond 1984. The Agency does not expect any plant compliance schedule for the installation of EDP to extend beyond 1987.

Prime Surfacer

Where EDP is used, water-borne primer surfacer or its equivalent can be phased in. However, where conventional spray priming is used, some firms have experienced problems in obtaining the necessary quality level in the primer coating. Accordingly, in plants scheduled to install EDP, the deferral of the conversion to water-borne primer surfacer or its equivalent to follow the EDP installation should be considered appropriate.

Topcoat

The basis used to establish reasonably available control technology (RACT) for topcoating of automobiles and light trucks is the level of emission-control achievable through the use of a water-borne coating. This is generally acknowledged to be a coating with 2.8 lb/gal solvent (less water) applied with a transfer efficiency of 30 percent. Because of the costs of retrofitting a plant to this technology and numerous product-related decisions, most automotive firms are pursuing alternative techniques to achieve an equivalent level of emission control. These include combinations of: improved transfer efficiency, coatings with higher solids content (less solvent), collection and recovery of spray booth emissions, and the installation of incinerators and/or heat recovery features on the exhaust gases from the curing ovens. The most desirable combination of these control techniques will vary from plant to plant. However, it now appears that the most cost-effective approach will always include use of a higher solids organic solvent coating (rather than a water-borne) when it can be incorporated without extensive facility modification.

Although coatings with the requisite solids content have not yet been fully commercialized, significant development efforts are underway to lower the solvent content of coatings in use. The Agency expects that the further development which will take place during the next few years will allow the industry to minimize or avoid altogether the need to rely on non-coating alternatives to achieve water-borne equivalence. Accordingly, EPA will approve any State-submitted schedule modifications which postpone final compliance with the emission limits for topcoat oper-

ations to the end of 1986 to allow for further development of coating technology. Such delays will allow more cost-effective compliance techniques to be used. In order to follow an orderly implementation effort nationally, some plants are expected to need until 1987 to achieve final compliance. States should consider these requests in light of the individual States circumstances.

A segment of the industry has expressed concern with the significant cost of add-on control equipment which would be required should this coating technology not be commercialized prior to the final compliance date. While there is a significant basis for confidence that appropriate coatings will be available in a timely fashion, the Agency will continue to monitor the applicability of this technology to individual industry situations. Should problems arise, the Agency will reconsider the available technology prior to the end of 1984 in light of industry capabilities at that time.

The industry is also concerned with the expense of incorporating this new coating technology in plants which now have relatively short ovens and spray booths. The application of RACT in such plants will need to recognize on a case-by-case basis the cost imposed by such physical limitations. The Agency does not interpret that RACT requires major reconstruction of ovens or booths. If use of water-borne coatings (or equivalent emission control) cannot be achieved without major reconstruction, then RACT should be interpreted as the use of the highest solids coatings and the highest available transfer efficiency appropriate for the facility. Since new low-emitting coatings are now being developed, additional information will be available by 1984 upon which to base modifications to emission limitations for topcoat operations at plants with relatively short ovens and spray booths. The Agency will work with States to address this circumstance as part of the evaluation of coating technology discussed above.

Between now and 1986 a significant number of existing plants will be making major modifications to meet product needs. The Agency does not recommend that States impose interim emission limitations at these facilities. Rather, the industry should be permitted to concentrate on compliance with ultimate emission limits. Efforts should be made, however, to assure that the facilities do not increase emissions in this interim period and that any major modifications made to the physical plant incorporate in the design the capability for the plant to subsequently adopt the new low solvent coatings in the 1986 time period. Specifically, plants which propose to alter their spray-booths and ovens to accommodate the basecoat/clear coat paint system or other technology should be required to assure that such modifications will permit subsequent adoption of the new generation of low solvent coatings.

New Source Review

There are two new source review (NSR) procedures which may be applicable to an individual surface coating operation renovation: standards of performance for new stationary sources required under Section 111 of the Act (NSPS) and preconstruction review requirements under either Part C or D of the Act. Based on the discussion below, the proposed schedules for applying clear coating which meet the SIP criteria discussed in this notice can also be allowed within the regulatory options allowed to the reviewing authority under NSR.

Section 111(j) of the Act allows EPA with the consent of the Governor of the State to grant waivers from the applicable NSPS if any requested waiver would meet certain tests. Based on section 111(j) criteria, the Agency expects to evaluate individual company requests for waivers to allow the use of basecoat/clear coat systems. Thus, if a section 111(j) waiver is granted, new basecoat/clear

coat operations will generally not have to meet the applicable NSPS upon startup.

The phased use of clear coat when it takes place at a new plant in a clean air area is subject to Part C preconstruction review. Where no new violations of the NAAQS would result from the construction of the new automotive plant and the BACT requirement is met by innovative control technology waiver, the Administrator believes that construction of new plants developing basecoat/clear coat technology should not be barred by PSD.

Part D of the Clean Air Act affects major construction projects in areas designated as nonattainment and with approved SIPs which demonstrate attainment by the prescribed time. The requirements of this preconstruction review are identified in section 173. Clarification is needed as to how two of the major requirements of section 173 can be met by new plants using basecoat/clear coat technology. These requirements are that any proposed major construction install controls so as to meet the lowest achievable emission rate (LAER), and secure sufficient emissions offsets so as to not jeopardize reasonable further progress in attaining the applicable NAAQS.

For those construction projects that would be subject to Part D NSR, the proposed evolution of clear coating technology appears to meet the intent of the LAER requirement. The Administrator feels that any system which offers the potential of providing greater emission reductions at less cost than current LAER technology should be encouraged. Thus, EPA would encourage any State LAER decision allowing for the evolution of clear coating technology which is consistent with the conditions of the 111(j) waiver.

While the State must also require the proposed source to secure enough offsetting emission reductions so that reasonable further progress (RFP) is maintained, the State has considerable flexibility in ensuring that RFP will be

achieved. The State has the option of accommodating any or all of the emissions from the new plants by emissions reductions achieved through the allocation of expected reductions from existing plants in the same area. For example, the State could require the new plant to offset only those emissions which will occur after the clear coating technology is in place and assure RFP by applying reductions obtained from other sources in the area during the phase-in period for this technology.

Under Executive Order 12291, EPA must judge whether a rule is "Major" and therefore subject to the requirement of a Regulatory Impact Analysis. This action is not Major because it is not expected to result in increased costs for the regulated community or for consumers. This action provides States information on the approvability of the extension of certain compliance schedule dates for automobile assembly plant paint shop operations.

This policy statement was submitted to the Office of Management and Budget for review under Executive Order 12291.

Dated: October 9, 1981.

Anne M. Gorsuch,

Administrator.

[FR Doc. 81-30433 Filed 10-19-81; 8:45 am]

c. Exhibit C: Letter from David M. Aldorfer to Kenneth A. Hagg (November 20, 1984)

[GM Square Logo]

Environmental Activities Staff
General Motors Corporation
General Motors Technical Center
30400 Mound Road
Warren, Michigan 48090-9015

November 20, 1984

Mr. Kenneth A. Hagg, Director
Division of Air Quality Control
Department of Environmental Quality Engineering
The Commonwealth of Massachusetts
One Winter Street
Boston, MA 02108

Re: General Motors-Framingham Plant VOC Compliance Plan

Dear Mr. Hagg:

Volatile organic compound emissions from automobile surface coating operations at the General Motors-Framingham plant are regulated under Massachusetts 310 CMR 7.18(7). This regulation includes organic solvent content limits of 2.8 lb VOC per gallon (minus water) for topcoat and 4.8 lb VOC per gallon for final repair coatings, both to be met by December 31, 1985.

The purpose of this letter is to propose an abatement program to achieve equivalent levels of emission control, instead of making the major process changes to entirely different coating materials that would be required to comply with these limits directly. To accomplish this program, General Motors requests the cooperation of the Department of Environmental Quality Engineering by amending 310 CMR 7.18(7) to extend the final compliance dates for these two operations from December 31, 1985 to December 31, 1987, and by establishing alternative increments of progress for this program, as follows:

Submit engineering plans	8/1/85
Order equipment	9/16/85
Begin construction	1/15/86
Achieve final compliance	12/31/87

As described in the attachment, the program includes both spraybooth and oven exhaust controls. Incinerators will be in place on the primer-surfacer oven by the end of 1985. This will make the primer-surfacer operation compliant with the RACT emission limit for this process by December 31, 1985, as required in 310 CMR 7.18(7). Installation of oven exhaust controls in the topcoat system, which is the first necessary element in reducing VOC emissions to meet the topcoat RACT standard, will be complete by the end of 1986. The increments of progress proposed above are keyed to the spraybooth controls that will also be needed to achieve compliance in the topcoat system.

General Motors proposes to retain lacquer repair coatings, in order to maintain compatibility with the topcoat materials, and to reduce mass VOC emissions from the topcoat system by enough to include the increment that would correspond to meeting the 4.8 lb VOC per gallon limit in the final repair process. Lacquer repair coatings cannot be formulated to meet the 4.8 lb VOC per gallon limit for this process, which is based on enamel repair materials.

In the interim, General Motors proposes to meet a 5.2 lb VOC per gallon limit for topcoat, and 6.5 lb VOC per gallon for final repair, both of which represent arithmetic averages across the color range of the coatings now in use.

The attached document explains in greater detail the rationale for the proposed abatement program and the need for additional time to complete it. We will be pleased to meet with you and your staff to discuss this proposal, and would like to suggest December 12 or 13, 1984, if your

schedule permits. Please call me at 313-575-8609 to let me know if one of these dates is acceptable, or if another would be preferable.

Thank you for your attention to this request.

Very truly yours,

/s/ David M. Aldorfer
David M. Aldorfer
Manager, Air Pollution Control
GM Environmental Activities Staff
Plant Environment

cc:Michael Maher

d. Exhibit D: Letter from D.M. Aldorfer to James Belsky (June 7, 1985)

[GM Square Logo]

Environmental Activities Staff
General Motors Corporation
General Motors Technical Center
30400 Mound Road
Warren, Michigan 48090-9015

June 7, 1985

Mr. James Belsky
Commonwealth of Massachusetts
Department of Environmental Quality Engineering
Division of Air Quality Control
5 Commonwealth Avenue
Woburn, MA 01801

Dear Mr. Belsky:

Since our meeting of January 4 to discuss the abatement program that we had proposed for the General Motors Framingham Assembly Plant, a total re-evaluation of the plant's situation has occurred. This has led to a major change in the manner in which GM proposes to comply with the VOC emission limits for topcoat and final repair operations. General Motors now is planning to replace the current lacquer topcoat and final repair systems with new facilities to use basecoat/clearcoat enamel coatings as the compliance strategy, rather than abating the current lacquer system.

The new paintshop will enable the plant to produce vehicles with a finish quality competitive in today's world market, and is consistent with the trend in the entire domestic auto industry to adopt the basecoat/clearcoat process. Further, it is consistent with the rationale expressed in the October 20, 1981 U.S. EPA policy statement regarding the extension of original topcoat compliance dates for the purpose of developing and introducing new coating technology, thereby minimizing or avoiding the need for non-coating alternatives.

To accomplish this program and demonstrate compliance, major construction of new paint facilities is required, which is expected to take 31 months to complete. Thus, the necessity for the extension of the current compliance dates for topcoat and final repair operations from December 31, 1985 to December 31, 1987, as previously requested, remains. After discussing the project scope and timing with you, we will develop and submit new dates for increments of progress appropriate for this program.

In the interim, General Motors proposes to meet a 5.2 lb VOC per gallon limit for topcoat, and 6.5 lb VOC per gallon for final repair, both of which represent arithmetic averages across the color range of the coatings now in use.

The following information is provided to demonstrate that using topcoat materials that average 5.2 lb VOC per gallon, in conjunction with the spray efficiency improvement from installing automatic electrostatic spray equipment, does not result in emissions exceeding the equivalent of the 5.0 lb VOC per gallon interim emission limit.

The interim limit of 5.0 was proposed by GM in its 1978 national paint compliance plan, to represent a nominal 27 percent volume solids lacquer chemistry. This value was based on information then available about this coating chemistry, which was still in development, and not in production use, at that time. In production use, average VOC for this generic type of dispersion lacquer is about 0.2 lb per gallon higher. For this evaluation, data from Dupont, one of the three major suppliers of dispersion lacquer, was used. Information supplied for 1984 model year colors showed an average of 5.22 lb VOC per gallon/26 percent volume solids. Compared on the basis of lb VOC per gallon of solids, these parameters indicate about 9 percent higher average VOC than the 5.0/.27 ratio - 20.1 vs 18.5.

The offsetting effect of the spray efficiency improvement can be evaluated by comparing topcoat usage per car before and after the conversion to electrostatic spray equipment. The reduction in solvent emission potential is directly proportional to the reduction in exterior paint usage, expressed in average gallons per car.

Average usage per car is tracked by the plant on a monthly basis. It varies slightly from month to month, but was running about 2.4 gallons per car for exterior coatings at the Framingham plant before the automatic electrostatic spray machines were installed. Since the conversion, experience ranges from 2.06 to 2.15, or an apparent reduction in the range of 11 to 14 percent. This reduction more than offsets the 9 percent higher emission potential for the 5.22 average VOC content.

Since variations in monthly average coating usage per car can reflect changes in other factors besides transfer efficiency, such as slight variations in dry paint film thickness, it is useful to estimate the reduction in paint usage at constant film thickness, and then to compare the result to the reduction noted in average monthly usage per car. This gives a cross check on the results of the first method.

This cross check was done by using a mathematical model of the topcoat system to estimate the gallons of paint sprayed hourly. All factors were held constant, except the values of transfer efficiency for the automatic spray machines involved in the conversion. A value of 65 percent was used to represent the electrostatics now in use, versus 45 percent to represent the air-atomized spray machines replaced by the electrostatics. The model weights the effect of these devices in with all the other spray equipment in the topcoat process, according to the volume of paint solids applied hourly with each type of spray equipment.

Hourly paint consumption estimated in this way was 144 gallons with the electrostatics, and 162 gallons with the previous conventional air spray machines. The difference

is 12 percent, which compares reasonably well with the savings observed so far in monthly average paint usage per car.

The results of this model also were used to estimate weighted average transfer efficiency for the entire topcoat process. This is the ratio of the volume of coating solids applied to a product to the volume of coating solids consumed in the process.

Ratioing the volume of applied topcoat solids versus the two volumes of solids sprayed, first with and then without the automatic electrostatics, yields weighted average transfer efficiences of 45 percent and 40 percent respectively. The latter value represents the baseline for translating the 5.0 lb VOC per gallon interim limit into an equivalent expression in lb VOC per gallon of applied coating solids. Dividing 5.0 first by the volume fraction solids (0.27) and then by baseline transfer efficiency (0.4) yields an equivalent of 46.3 lb VOC per gallon of applied solids. Using the same technique, 5.22/0.26 coatings sprayed at 45 percent transfer efficiency yields 44.6, which again shows that the improved spray efficiency offsets the higher VOC level.

It is necessary to use these comparisons, because there are no field measurements of Framingham topcoat transfer efficiency before and after converting to the automatic electrostatics. The validity of the model is supported by comparing the overall efficiency it predicts for Framingham with measured results from the Fairfax, Kansas plant, which also uses dispersion lacquer and automatic electrostatics in its topcoat process. Fairfax results were in the 48-53 percent range, spraying a longer and wider car body, with proportionally larger body surface areas being sprayed electrostatically. Better efficiency is expected because of the larger target areas at Fairfax for its electrostatics. Considering the size difference between the cars, the Framingham transfer efficiency seems reasonable in comparison.

While none of these comparisons might be conclusive by themselves, together they support a level of paint and emissions savings via improved transfer efficiency that offsets the difference between 5.2 and 5.0 lb VOC per gallon in the topcoat. On this basis, General Motors believes there is adequate justification to consider the present system compliant on an equivalent basis with the 5.0 limit.

We would appreciate the opportunity to meet with you soon to discuss this program in detail. I will call to arrange a mutually satisfactory date.

Sincerely,

/s/ David M. Aldorfer
D. M. Aldorfer
Manager, Air Pollution Control
Environmental Activities Staff

e. Exhibit E: Commonwealth of Massachusetts, Department of Environmental Quality Engineering, Division of Air Quality Control, "Amendments to Regulation 310 CMR 7.18(7)" (December 30, 1985)

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Environmental Quality Engineering
Division of Air Quality Control
One Winter Street, Boston 02108

S. RUSSELL SYLVA
Commissioner

December 30, 1985

Honorable Michael Joseph Connolly
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Connolly:

Attached for filing, in compliance with General Laws, Chapter 30A, are two attested copies of an amendment to this Department's Air Pollution Control Regulations, 310 CMR 7.18(7), which are being promulgated pursuant to the authority granted by General Laws, Chapter 111, Section 142 A - 142 E.

This amendment is to take effect January 1, 1986.

I hereby attest that the attached are true copies of this amendment.

Very truly yours,

/s/ Bruce K. Maillet
Bruce K. Maillet
Acting Director
Division of Air Quality Control

BKM/EVR/ch

THE COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF ENVIRONMENTAL QUALITY
ENGINEERING DIVISION OF AIR QUALITY CONTROL
ONE WINTER STREET
BOSTON, MASSACHUSETTS 02103

AMENDMENTS TO
REGULATION 310 CMR 7.18(7)

FOR

THE CONTROL OF AIR POLLUTION

IN THE

BERKSHIRE AIR POLLUTION CONTROL DISTRICT
PIONEER VALLEY AIR POLLUTION
CONTROL DISTRICT
MERRIMACK VALLEY AIR POLLUTION
CONTROL DISTRICT
METROPOLITAN BOSTON AIR POLLUTION
CONTROL DISTRICT
CENTRAL MASSACHUSETTS AIR POLLUTION
CONTROL DISTRICT
SOUTHEASTERN MASSACHUSETTS AIR POLLUTION
CONTROL DISTRICT

REGULATORY AUTHORITY:

M.G.L. C. 111, Section 142A-142E

Please note:

310 CMR 7.13 is hereby amended by striking out the Compliance Dates for Topcoat application and Final repair application (December 31, 1985) and inserting in place thereof the date August 31, 1987.

The changes to the regulation are identified by **bold print.** 310 CMR *7.13: U Volatile Organic Compounds*

(7) *U Automobile Surface Coating.* No person owning, leasing, or controlling the operation of any automobile assembly plant shall cause, suffer, allow, or permit emissions therefrom in excess of those emission limitations set forth in the following table and within the time schedules specified in the following table.

Table 5
Emission Limitations
Automobile Surface Coatings

U Volatile Organic Compounds

Emission Source	Emission Limitations Lbs. of volatile organic compounds per gallon of coating (excluding water) at application	Compliance Date Achieve full Compliance with emission limitation
Primer application flash off area, and oven	2.1 and 1.2	By July 1, 1979 By December 31, 1982
Primer-surfacer application, flash off area, and oven	3.0 and 2.3	By December 31, 1980 By December 31, 1985
Topcoat application flash off area, and oven	5.3* 5.0* and 2.8*	By December 31, 1979 By December 31, 1982 By **August 31, 1987**
Final repair application flash off area, and oven	4.8*	By **August 31, 1987**

* *Note:* Compliance with these emission limitations shall be based upon an arithmetic average of topcoat coatings and final repair coatings.

The Department may issue such orders and establish such interim deadlines that it deems necessary.

f. Exhibit F: Letter from S. Russell Sylva to Michael Deland (with attachments) (December 30, 1985)

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Environmental Quality Engineering
One Winter Street, Boston 02108

S. RUSSELL SYLVA
Commissioner

December 30, 1985

Michael Deland
Administrator, Region I
Environmental Protection Agency
J.F.K. Federal Building
Boston, Massachusetts 02203

Re: Approval of Revisions to
Massachusetts Implementation
Plan. SIP #8502
310 CMR 7.18(7)

Dear Mr. Deland:

The Department of Environmental Quality Engineering hereby submits for your review amendments to 310 CMR 7.18(7) of the Massachusetts Air Pollution Control Regulations.

The amendment to the regulations will allow the General Motors facility in Framingham more time for installation of new topcoating technology. The SIP revision allows the existing topcoat and final repair operations to continue while the paintshop that will house the new basecoat/clearcoat topcoating operation is constructed. A permit will be issued to allow the installation of the new low emission topcoating operation.

The Division of Air Quality Control respectfully submits for your approval amendments to 310 CMR 7.18(7) of the

Regulations for Control of Air Pollution in the Berkshire, Central Massachusetts, Merrimack Valley, Metropolitan Boston, Pioneer Valley, and Southeastern Massachusetts Air Pollution Control Districts.

The Division encloses for your consideration the following:

1. A copy of the public notice.
2. A certification:
   a. that the public hearing was held in accordance with the public hearing requirements,
   b. of the dates that the public notices were published,
   c. of the newspapers in which the notices were published,
   d. of the dates on which notices to EPA, local and out-of-state air pollution agencies were mailed,
   e. of the date, time and place at which the public hearing was held, together with a statement that it was in conformance with the foregoing notices.
3. A summary of written and oral testimony presented at the public hearing and a copy of the written testimony.
4. A copy of the recommendations of the Director of the Division of Air Quality Control to the Commissioner of the Department of Environmental Quality Engineering regarding this regulatory revision (Decision Memorandum dated December 30, 1985)
5. A copy of the Support Document for the proposed regulation amendment.

Unedited tape recordings of the hearings are available for inspection by the Environmental Protection Agency.

The Department of Environmental Quality Engineering is of the opinion that this action is in conformance with

the provisions of the Clean Air Act, has been adopted after compliance with all applicable requirements and will contribute to the attainment and maintenance of the National Ambient Air Quality Standards.

It is therefore recommended that the amendments to 310 CMR 7.18(7) of the Regulations for Control of Air Pollution in the Berkshire, Central Massachusetts, Merrimack Valley, Metropolitan Boston, Pioneer Valley, and Southeastern Massachusetts Air Pollution Control Districts be approved as a revision to the Massachusetts State Implementation Plan.

Very truly yours,

/s/ [illegible signature]
S. Russell Sylva
[Acting] Commissioner

SRS:EVR:dep
Enclosures

The Commonwealth of Massachusetts
Secretary of State

REGULATION FILING AND PUBLICATION

1. REGULATION CHAPTER NUMBER AND HEADING: 310 CMR 7.18(7): Air Pollution Control Regulations
2. NAME OF AGENCY: Department of Environmental Quality Engineering
3. READABLE LANGUAGE SUMMARY: State the general purposes and requirements of this regulation as well as the process, organizations and businesses affected.

   The amendment to the regulations will allow the General Motors facility in Framingham more time for installation of new low-emission topcoating technology.
4. AGENCY CONTACT FOR ADDITIONAL INFORMATION: Karen Reed Address: Division of Air Quality Control, DEQE Telephone 229-5630 One Winter Street, 8th Floor, Boston, MA 02108
5. STATUTORY AUTHORITY: M.G.L. c. 111 s. 142A-142E The Regulations Division will complete the following 6. and 7.
6. PUBLICATION: Massachusetts Register Number _____ Date _____ Code of Massachusetts Regulation Volume _____ Page_____
7. EFFECTIVE DATE:_____
8. FISCAL EFFECT STATEMENT Section 5: Estimate of the fiscal effect of this regulation including that on the public and private sector, for the first and second year, and a projection over the five-year period, or a statement of no fiscal effect:

   No fiscal effect to either the public or private sector
9. PUBLIC HE RING OR COMMENT:

   Section 2 _ _ Date(s) of public hearing 12/16/85

Section 3 _x_ Date(s) of public comment same: as above

Emergency ss. 2 or 3_____ State the nature of the emergency:_____

10. PUBLICATION OF NOTICE
Was notice of this regulation filed with the State Secretary, published in appropriate newspapers and sent to persons to whom specific notice must be given 21 days prior to the public hearing or agency action?

Yes

11. If prior approval of and/or notification to the governor, legislature or others was required for this regulation list each approval and the date: (Include here notice to the Governor's Management Task Force and the Local Government Advisory Committee)

No prior approvals or notification required

12. State how the regulation adds, supersedes, amends or deletes regulations already on file with the State Secretary, including the most recent effective date.

Amends 310 CMR 7.18(7) by striking out the compliance dates for topcoat application, and final repair application and inserting in place the date August 31, 1987.

This is effective 01/01/86

DEPARTMENT OF ENVIRONMENTAL QUALITY
ENGINEERING DIVISION OF AIR QUALITY CONTROL

NOTICE

Notice is hereby given that the Department of Environmental Quality Engineering, acting in accordance with the provisions of M.G.L. Chapter 111, Section 142A through 142D, and in conformance with the Clean Air Act as amended August 7, 1977 will hold a public hearing on the following proposed matters, to be applicable to all Districts.

It is proposed to amend regulation 310 CMR 7.18(7) Automobile Surface Coating and the 1982 State Implementation Plan for ozone and carbon monoxide by extending the compliance dates for the topcoat and final repair operations from December 31, 1985 to December 31, 1987. This amendment affects the General Motors Automobile Surface Coating facility in Framingham, Massachusetts.

In addition, the Department proposes conditional approval of General Motors application to construct an addition to the existing facility. The new operation is subject to Lowest Achievable Emission Rate (LAER) and the emissions from the new facility must be balanced by equivalent emission reductions (offsets) such that a net air quality benefit is secured.

The public hearing will be conducted under the provisions of N.G.L. Chapter 30A on:

December 16, 1985—Woburn—1:00 P.M.

Department of Environmental Quality Engineering

3 Commonwealth Avenue, Woburn—Conference Room.

Testimony may be presented orally and/or in writing no later than the conclusion of the public hearing. Parties are requested to submit *four* written copies of their testimony at the hearing.

Copies of the proposed regulation amendment and background information will be available for inspection at the Division of Air Quality Control, 8th Floor, One Winter Street, Boston, Massachusetts, at the Merrimack Valley and Boston Air Pollution Control Districts, 5 Commonwealth Avenue, Woburn, Massachusetts, at the Berkshire and Pioneer Valley Air Pollution Control District, State House West 436 Dwight Street, Springfield, Massachusetts, at the Central Massachusetts Air Pollution Control District, 75 Grove Street, Worcester, Massachusetts and at the Southeastern Massachusetts Air Pollution Control District, Lakeville Hospital, Lakeville, Massachusetts.

By Order of the Department.

S. Russell Sylva
Commissioner

THE COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF ENVIRONMENTAL QUALITY ENGINEERING

DIVISION OF AIR QUALITY CONTROL

ONE WINTER STREET

BOSTON, MASSACHUSETTS 02108

PROPOSED AMENDMENTS TO REGULATION 310 CMR 7.18(7)

FOR

THE CONTROL OF AIR POLLUTION

IN THE

BERKSHIRE AIR POLLUTION CONTROL DISTRICT

PIONEER VALLEY AIR POLLUTION CONTROL DISTRICT

MERRIMACK VALLEY AIR POLLUTION CONTROL DISTRICT

METROPOLITAN BOSTON AIR POLLUTION CONTROL DISTRICT

CENTRAL MASSACHUSETTS AIR POLLUTION CONTROL DISTRICT

SOUTHEASTERN MASSACHUSETTS AIR POLLUTION CONTROL DISTRICT

REGULATORY AUTHORITY:

M.G.L. C. 111, Section 142A - 142D

NOVEMBER, 1985

Please Note:

Proposed changes to the regulation are identified by bold print

310 CMR *7.18: U Volatile Organic Compounds*

(7) *U Automobile Surface Coating.* No person owning, leasing, or controlling the operation of any automobile assembly plant shall cause, suffer, allow, or permit emissions therefrom in excess of those emission limitations set forth in the following table and within the time schedules specified in the following table.

Table 5
Emission Limitations
Automobile Surface Coatings

U Volatile Organic Compounds

Emission Source	Emission Limitations Lbs. of volatile organic compounds per gallon of coating (excluding water) at application	Compliance Date Achieve full Compliance with emission limitation
Primer application, flash off area, and oven	2.1 and 1.2	By July 1, 1979 By December 31, 1982
Primer-surfacer application flash off area, and oven	3.0 and 2.3	By December 31, 1980 By December 31, 1985
Topcoat application flash off area, and oven	5.3* 5.0* and 2.8*	By December 31, 1979 By December 31, 1982 By **December 31, 1987**
Final repair application, flash off area, and oven	4.8*	By **December 31, 1987**

* *Note:* Compliance with these emission limitations shall be based upon an arithmetic average of topcoat coatings and final repair coatings.

CERTIFICATION

I hereby certify that notices of public hearings were published on the following dates in the following newspapers:

The Boston Herald (Boston)	November 15, 1985
Middlesex News (Framingham)	November 16, 1985
Worcester Gazette (Worcester)	November 16, 1985
Morning Union (Springfield)	November 13, 1985
Cape Cod Standard Times (Hyannis)	November 16, 1985
Lawrence Eagle Tribune (Lawrence)	November 16, 1985

I further certify that the notices specified the date, time, and place of the public hearing to be held on the proposed amendment of 310 CMR 7.18(7) and revise the 1982 State Implementation Plan for ozone and carbon monoxide as well as the proposed conditional approval of General Motors application to construct an addition to the existing facility in Framingham, Massachusetts. I also certify that the notices specified the locations at which the proposed regulation amendments, etc., together with supporting information, was available for public inspection. I also certify that the proposed regulation revisions and supporting information was available at the locations stated in the notice when the notices were published as well as at the location and date of the public hearing. I further certify that similar notices were mailed on or before November 18, 1985 to the Environmental Protection Agency, to any affected local or pollution control agencies, and to all known potentially interested parties.

I further certify that on the following date and at the following place a hearing was conducted by the Massachusetts Department of Environmental Quality Engineering, pursuant to the above notices and in conformance with the provisions of 30 C.F.R. 51.4(b):

December 16, 1985—Woburn—1:00 p.m. Department of Environmental Quality Engineering, 5 Commonwealth Avenue, Woburn, MA—Conference Room

Attest: /s/ Ellen V. Robertson
Ellen V. Robertson
Acting Hearing Officer

EVR:dep

DEPARTMENT OF ENVIRONMENTAL QUALITY ENGINEERING

DIVISION OF AIR QUALITY CONTROL

Summary of Written and Oral Testimony
Presented at the Public Hearing for the Proposed:

- Amendment to Regulation 310 CMR 7.18(7) Automobile Surface Coating (extending compliance deadline for topcoat and final repair operations)
- Revisions of the 1982 State Implementation Plan for Ozone and Carbon Monoxide
- Conditional Approval of General Motors' New Paint Shop Application and Offset Requirements (310 CMR 7.00 Appendix A)

The Public Hearing Was Conducted Under the Provisions of MCL Chapter 30A on:

December 16, 1985—Woburn—1:00 pm
Department of Environmental Quality Engineering
5 Commonwealth Ave., Woburn—Conference Room

December, 1985

The Department received written and oral testimony from:

- U.S. Environmental Protection Agency, State Air Progress Branch (Linda Murphy)
- General Motors, Framingham Plant (Ronald Boyd)
- American Lung Association (Michael Ellenbecker)

In response to the proposed amendment to 310 CMR 7.18(7) and revision of the 1982 State Implementation Plan for Ozone and Carbon Monoxide:

- EPA did not oppose the proposed amendment and revision, but had reservations because GM's request

for an extension of two years for its compliance deadline makes no attempt to limit emissions during the extension, nor does it contain any guarantees that the new basecoat/clearcoat line will result in better controls than RACT controls on the old line.

- GM requested approval of the proposed amendment and revision.
- The American Lung Association found the compliance deadline extension acceptable, however it questioned the date that building construction is to begin, expressing concern that construction not begin until the necessary permits are issued, and that GM be required to document interim progress.

In response to the proposed conditional approval of GM's new paint shop application and offset requirements:

- EPA did not oppose this approval but gave a list of areas that the Department should address before a new source review permit is issued, and a list of conditions that should be specified as legally enforceable in the new source review permit as required in the Clean Air Act (Section 173). (These specific issues are discussed in the Response to Testimony.)
- GM requested approval of the application and offset requirements. GM's written testimony contains corrections and clarifications to the Department's November 15, 1985 letter which contained the data and findings used as the basis for its proposal to grant conditional approval.
- The American Lung Association did not oppose the approval, but expressed concern about how the Department is calculating and crediting the offsets. While they believe that stationary sources should be required to locate offsets from other stationary sources, not mobile sources, they do realize that

the predominance of hydrocarbon emissions in Massachusetts (and therefore the available source of offsets) is from mobile sources. They listed a number of questions about the use of emissions reductions calculated from the first nine months that the I/M program was in place (discussed in the Response to Testimony). They asked that the Department not adopt the proposed amendments until these questions are adequately addressed.

Department comment:

- The SIP revision will be extending the compliance date for the topcoating and final repair operations until August 31, 1987. The hearing notice had a proposed compliance deadline of December 31, 1987. As GM has committed to August 31, 1987 for shutting down existing topcoating operations, the regulation will only be extended to August 31, 1987.

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Environmental Quality Engineering
Division of Air Quality Control
One Winter Street, Boston 02108

S. RUSSELL SYLVA
Commissioner

MEMORANDUM

TO: S. Russell Sylva

THRU: Thomas F. McLoughlin

FROM: Bruce K. Maillet

DATE: December 30, 1985

SUBJECT: Decision Memorandum—Regulatory Changes to Sections to 310 CMR 7.18(7) and New Source Review Permit for the General Motors Automobile Surface Coating Facility in Framingham, Massachusetts.

PURPOSE:

By extending the regulation compliance date for the topcoating operations, the proposed amendment to the regulation will allow the General Motors plant more time for installation of new topcoating technology. The SIP revision allow existing topcoat operations to continue as is while the paint shop that will house the new basecoat/clearcoat topcoating operations is constructed.

BACKGROUND

The Department is making one change to its regulations. That change applies to 310 CMR 7.18(7) Automobile Surface Coating. The change would extend the compliance dates for the topcoat and final repair operations from December 31, 1985 to August 31, 1987. This change in the regulations shall be submitted to EPA as a revision to the

State Implementation Plan for Ozone and Carbon Monoxide.

In addition, the Department has conditionally approved General Motors application to construct an addition to the existing facility. The addition will replace equipment currently used in the coating operation with improved technology. The new operation is subject to Lowest Achievable Emission Rate (LAER) and the emissions from the new facility have been balanced by equivalent emission reductions (offsets) for a net benefit to air quality.

MAJOR ISSUES

The Department received testimony from the General Motors Corporation, EPA and the American Lung Association. Testimony received was generally supportive of both the proposed amendment to the regulation and the permit for the new paintshop.

EPA had several questions which they felt the Department should address prior to issuance of the New Source permit. These specific issues are addressed in the Response to Testimony.

American Lung Association questioned the source of the offsets used in the New Source Permit review. This too was addressed in the Response to Testimony.

AIR QUALITY IMPACTS/RESOURCE ESTIMATE

The effect of the amendments is to allow additional time to the General Motors Facility for installation of new technology which will have an ultimate benefit to air quality. The addition to the facility in Framingham will not adversely affect the ability of the Department to demonstrate a 35% reduction in volatile organic emissions by the year 1987.

It is estimated that the regulation changes and permit will require minimal Department personnel resources per

year. The resources that will be required will be devoted to enforcement of the regulation and permit.

PUBLIC PARTICIPATION

The Department published public notice providing the opportunity to review technical support documentation thirty days prior to the public hearing on December 15, 1985.

COMPLIANCE WITH MEPA:

This project is "categorically exempt" from the "Regulations Governing the Preparation of Environmental Impact Reports" because the proposed regulations will not reduce existing levels of emission control. All reasonable measures have been taken to avoid or minimize adverse impacts.

RECOMMENDATION:

I recommend that the proposed amendment to 310 CMR 7.18(7) of the Regulations for the Control of Air Pollution to the Berkshire, Central Massachusetts, Merrimack Valley, Metropolitan Boston, Pioneer Valley, and Southeastern Massachusetts Air Pollution Control Districts be adopted as a revision to the Massachusetts State Implementation Plan.

Legal Office:

Concur: _____ Date: _____

Deputy Commissioner:

Concur: _____ Date: _____

Acting Commissioner:

Concur: [signature illegible] Date: 12-31-85

EVR:dep

BACKGROUND INFORMATION
AND
TECHNICAL SUPPORT
FOR
PUBLIC HEARINGS
ON
PROPOSED AMENDMENTS

TO

310 CMR 7.18(7) and
Requirements of
310 CMR 7.00 Appendix A

Of the Regulations
for the
Control of Air Pollution
in the

Berkshire Air Pollution Control District
Central Massachusetts Air Pollution Control District
Merrimack Valley Air Pollution Control District
Metropolitan Boston Air Pollution Control District
Pioneer Valley Air Pollution Control District
Southeastern Massachusetts Air Pollution Control District

November, 1985

Proposal

The Department of Environmental Quality Engineering proposes to amend 310 CMR 7.18(7), *Automobile Surface Coating*, by extending the compliance deadline listed in Table 3 for the topcoat and final repair applications. Specifically, the final compliance date of December 31, 1985 will be extended to December 31, 1987. This will be a

revision to the Massachusetts State Implementation Plan (SIP).

Affected Sources

This amendment to 310 CMR 7.18(7), *Automobile Surface Coating,* will affect one source in the Commonwealth, General Motors (GM) in Framingham.

Compliance Status

The existing operations at the General Motors Facility are subject to 310 CMR 7.18(7), *Automobile Surface Coating.* This regulation pertains to specific coating operations such as the primer, primer surfacer, topcoat and final repair processes. The regulation sets a limit of pounds of volatile organic compounds (VOC) per gallon of coating (excluding water) and interim and final dates to meet the particular limits for each operation. The earliest date was July 1, 1979 and the final date is December 31, 1985. The interim dates are important to assure that progress is being made toward achieving the final requirements.

GM—Compliance History

The emission limits and compliance dates in the Environmental Protection Agency's (EPA) Control Techniques Guideline for automobile surface coating as adopted by Massachusetts were derived as part of a national compliance plan with input from General Motors in the late 1970's. States' acceptance of this plan made it possible for GM to phase in compliance for the one-hundred plus coating operations affected by these rules over an eight year period ending in 1987 (rather than 1982).

The 1977 amendments to the Clean Air Act had changed the deadlines for compliance with the air quality standards to December 31, 1982. There were provisions in the law allowing areas with ozone problems to obtain extensions from the 1982 deadline until December 31, 1987. Massachusetts received an extension.

The extra time was important because GM was able to concentrate on converting primer systems to a waterborne electrodeposition process and also to reduce the VOC content of the lacquer topcoat materials.

[The Framingham plant met all interim RACT deadlines with an electrodeposition primer system and high solids primer-surfacer with electrostatic spray guns and the dispersion lacquer topcoat operations.]

EPA recognized that the auto industry was moving toward new topcoat technology in its October 20, 1981 policy statement for extending auto paintshop VOC compliance schedules. EPA has allowed extensions in other states. This regulation change makes it possible for GM to continue development of the new high solids basecoat/clearcoat (BC/CC) enamel topcoat systems to meet product objectives and VOC standards.

Because of the number of GM assembly plants and car lines involved, it has not been possible to complete the transition to BC/CC at all plants, to date. Knowing this, GM decided to follow an abatement strategy at the existing Framingham plant. The initial plan to meet regulation requirements was to complete preliminary engineering in mid-1985. Construction would begin in early 1986 with completion targeted in mid-1987. This plan would also require an extension even though the new technology was not going to be introduced at the Framingham facility. On June 7, 1985, GM notified the Department that the strategy for the Framingham facility had changed. GM is now planning to replace the current lacquer topcoat and final repair systems with new facilities to use the BC/CC enamel coatings as the new compliance strategy, rather than abating the current lacquer systems. GM will also install an incinerator on the primer-surfacer operation.

[The BC/CC topcoat consist of a relatively thin layer of highly pigmented basecoat followed by a thicker layer of clearcoat. The BC/CC coatings have a more appealing ap-

pearance than non-BC/CC topcoat systems and also offer improved chemical resistance and gloss retention. This technology has been used in Europe and Japan and American manufacturers feel they must adapt to this technique in order to remain competitive.]

The new paintshop will enable the plant to produce vehicles with a finish quality competitive in today's world market, and is consistent with the trend in the entire domestic auto industry to adopt the BC/CC process. Further, it is consistent with the rationale expressed in the October 20, 1981 U.S. EPA policy statement regarding the extension of original topcoat compliance dates for the purpose of developing and introducing new coating alternatives.

To accomplish this program and demonstrate compliance, major construction of new paint facilities is required, which is expected to be complete by August 1987. Thus, the necessity for the extension of the current compliance dates for topcoat and final repair operations from December 31, 1985 to December 31, 1987.

Offsetting emission reductions are required as detailed in 310 CMR 7.00 Appendix A. Some offsets are generated when the existing plant shuts down. Others are generated when emission reductions in a variety of areas are achieved that exceed planned emission reductions. These planned emission reductions are required for any state that is nonattainment for a criteria pollutant standard.

As specified in the 1982 State Implementation Plan for ozone and carbon monoxide, each source of VOC (a precursor pollutant to ozone formation) must reduce emissions of VOC to a level based on Reasonably Available Control Technology (RACT) by 1987. For each year between 1980 and 1987 a target reduction was established and the actual reductions in any given year are compared to the target to determine whether reasonable further progress (RFP) is being met. In the 1983 RFP demonstration for Eastern

Massachusetts the actual reductions exceeded the target by 10,000 tons. Much of this additional reduction was credited to the performance of the Massachusetts Inspection/ Maintenance (I/M) program.

The offsets needed for the GM, Framingham facility have been accomodated from the I/M program. New emission reduction estimates have been made for 1987 to ensure that the offsets will be permanent and not affect RFP demonstrations in the year of projected attainment (1987) or beyond.

Through this process Massachusetts has demonstrated that this amendment is consistent with the 1982 SIP and that Massachusetts will continue making reasonable further progress toward attaining the ozone standard by 1987.

Emission Reduction and Reasonable Further Progress

As stated previously the existing topcoat and final repair operations will continue to operate until the start-up of the new topcoat (BC/CC) system. As the topcoat and final repair operations are new, they are subject to New Source Review and therefore required to meet the Lowest Achievable Emission Rate (LAER) and offset any increase in emissions. GM submitted a LAER determination on November 6, 1985. Offsets have been identified and are discussed in more detail in this section. New Source Review requires that a net air quality benefit be derived in this process. The net result is that GM by offsetting proposed VOC emissions will achieve this net air quality benefit (a decrease from existing emissions) when the new topcoat operations replace the old. Existing emissions during 1986 and 1987 are expected to be as follows:

Expected Emissions

Year	Tons/year
1986	4288
1987	3816

These emissions estimates were calculated on a pounds of VOC emitted per car basis. Air pollution controls (i.e. incinerators) will be installed to reduce these emissions from these levels. These estimates also will be reduced due to normal equipment maintenance and downtime.

Compliance and Enforcement

Compliance and enforcement information will be discussed on a pounds of VOC per car basis. Although equivalent, this differs from the units as stated in the regulation. The limits in the regulation are on a pounds of VOC per gallon of coating (excluding water) basis. GM has provided adequate support in the permit application demonstrating equivalency by providing detailed coating content and transfer efficiency information. Although the regulation will not change to a pounds of VOC per car limit, for SIP purposes this is the limit that will be used.

Proposed Project Schedule

Two actions are being discussed at this public hearing. One is a regulation change affecting the existing General Motors facility in Framingham. The second issue relates to General Motors' proposed topcoat and final repair replacement facility. The proposed facility (considered to be a major modification) will be connected to the existing facility. The proposed replacement facility is related to the first issue in that the old facility (specifically the topcoat and final repair operations) will shutdown as the new facility starts up and will provide part of the required offsetting emission reductions. For that reason, the proposed project schedule is included here.

Proposed Schedule

Topcoat and Final Repair Operations

Building construction begins	December 18, 1985
Process equipment installation begins	June 13, 1986
Building construction complete	March 1, 1987

Process equipment installation complete	August 4, 1987
Existing topcoat and final repair shutdown	August 31, 1987
New topcoat and final repair (basecoat/clearcoat) start up	August 31, 1987

Air Quality Impacts

The regulation change will not cause or contribute an unreasonable risk to public health, welfare or safety as the result is a net decrease in emissions.

New source review has been required for the new portion of the facility. GM will be required to achieve the Lowest Achievable Emission Rate (LAER) on topcoat and final repair operations and must offset these emissions such that there is no increase in emissions and a net air quality benefit is achieved.

Public Participation

As provided for by law, the Department gives notice and provides opportunity to review technical support 30 days prior to proposing the regulation change at a public hearing on December 16, 1985.

MEPA

This project is "categorically exempt" from the "Regulations Governing the Preparation of the Environmental Impact Report" because the proposed regulation amendment will result in an increase in emission control. All reasonable measures have been taken to avoid or minimize adverse impacts.

Ozone Standard Attainment

The attainment date for the National Ambient Air Quality Standard for ozone will not be affected as the regulation requires compliance prior to the attainment date. Emissions of VOC will be reduced which should result in further progress toward attainment of the ozone standard.

Economic Impacts

The economic impacts from this change are negligible. Specifically, GM will shutdown the existing facility as the new facility starts up. It is not cost effective to control existing topcoat and final repair operations in the interim before the new facility is on-line. This interim control cost has been estimated to be 64.5 million.

g. Exhibit G: Letter from Louis F. Gitto to F. James McDonald (with attached "Notice of Violation and Reporting Requirement") (August 14, 1986)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION I
J. F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203

August 14, 1986

CERTIFIED MAIL-
RETURN RECEIPT REQUESTED

F. James McDonald, President
General Motors Corporation
3044 West Grand Boulevard
Detroit, MI 48202

Dear Mr. McDonald:

Enclosed is a Notice of Violation issued by the United States Environmental Protection Agency (EPA) to General Motors Corporation's (GM) automobile assembly plant in Framingham, Massachusetts concerning violations of the applicable State Implementation Plan (SIP) 310 CMR § 7.18(7), as approved by EPA. The Notice sets out the legal and factual bases which support it. EPA is likely to take enforcement action if General Motors does not correct the violation within the next thirty days.

Please note that issuance of this Notice of Violation does not preclude issuance of the Delayed Compliance Order (DCO) which has recently been the subject of negotiations among General Motors, EPA and the Massachusetts Department of Environmental Quality Engineering. For federal approval of any DCO, however, we must insist that the negotiation process proceed in an expeditious manner. If it is not possible for the parties to reach agreement on the content of a DCO within 30 days of your receipt of

this Notice and if the violation continues, EPA will decide which other enforcement options to pursue under Sections 113 and 120 of the Clean Air Act (42 U.S.C. §§ 7413 and 7420).

General Motors may confer with EPA concerning the violation cited in the Notice. The Notice sets out the procedure to request a conference. I urge you to request such a conference to discuss the most expeditious method for General Motors to come into compliance with the applicable SIP, 310 CMR § 7.18(7), as approved by EPA, so that we may reach agreement regarding General Motors' compliance plan, including an implementation schedule. A conference may also clarify whether a DCO is negotiable in this case.

Also enclosed is a Reporting Requirement, issued under the authority of Section 114 of the Clean Air Act, which requires that GM submit to EPA certain information and records on a monthly basis.

Sincerely,

/s/ Louis F. Gitto
Louis F. Gitto, Director
Air Management Division

cc: B. Maillet, DEQE
D. Shallcross, DEQE
G. Hailer, DEQE
M. Maher, DEQE
P. McCarroll, GM
W. McFarland, GM
R. Boyd, GM
F. Bellafato, GM

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Region I

Docket No. AAA-86-1108

NOTICE OF VIOLATION

and

REPORTING REQUIREMENT

IN THE MATTER OF
General Motors Corporation
63 Western Avenue
Framingham, MA 01701

Proceedings under Section 113 and 114 of the Clean Air Act, as amended, 42 U.S.C. §§ 7413 and 7414

STATUTORY AUTHORITY

Under Section 113(a)(1) of the Clean Air Act (Act), 42 U.S.C. § 7413(a)(1), the Administrator of the United States Environmental Protection Agency (EPA) is required to notify any person in violation of any requirement of an applicable implementation plan, whenever the Administrator determines that the person is violating the plan. The Administrator has delegated this authority to the Regional Administrator.

The Commonwealth of Massachusetts adopted an "applicable implementation plan," within the meaning of Section 113(a)(1) of the Act, which was approved by EPA under Section 110 of the Act. The plan includes the Air Pollution Control Regulations (State Regulations) codified at 310 CMR § 7.00 *et seq.*

Section 114(a)(1) of the Act allows the Administrator to require the owner or operator of any emission source to

provide such information as may be required to determine whether the person is in violation of the requirements of an applicable implementation plan.

FINDINGS

1. General Motors Corporation (GM) owns and operates an automobile assembly plant which is located in Framingham, Massachusetts. This facility includes topcoating and final repair automobile surface coating processes.

2. General Motors Corporation is a company whose headquarters is located in Detroit, Michigan, and which is incorporated in the State of Delaware.

3. The topcoating and final repair automobile surface coating operations at GM in Framingham, Massachusetts together emit in excess of 100 TPY of volatile organic compounds (VOCs).

4. GM in Framingham, Massachusetts does not own or operate any add-on pollution control equipment for the control of VOCs from its existing topcoating and final repair operations.

5. The topcoating and final repair operations at GM in Framingham, Massachusetts are subject to the requirements of Regulation 7.18(7) of the Massachusetts State Implementation Plan (SIP) (310 CMR § 7.18(7)), as approved by EPA on September 16, 1980 and November 9, 1983 (45 FR 61293 and 48 FR 51840). EPA has not approved into Massachusetts' SIP any changes made to 310 CMR § 7.18(7) by the state since November 9, 1983.

6. 310 CMR § 7.18(7), as approved by EPA, provides that, after December 31, 1985, no person owning or controlling the operation of any automobile assembly plant shall cause, suffer, allow, or permit emissions from the

topcoat application, flash off area, and oven in excess of 2.8 lbs of VOCs per gallon of coating (excluding water) at application, or from the final repair application, flash off area, and oven in excess of 4.8 lbs VOC per gallon of coating (excluding water) at application. Compliance with these limitations shall be based upon an arithmetic average of topcoat coatings and of final repair coatings. All emission calculations are to be done on a solids applied basis.

7. In response to a Reporting Requirement EPA issued on July 3, 1986 under Section 114 of the Act, 42 U.S.C. § 7414, on July 24, 1986 GM submitted to EPA coating content data derived from independent laboratory coating analyses using EPA Reference Method 24. These data and GM's response show that from January 1, 1986 through June 30, 1986 GM used topcoatings with an arithmetic average VOC content of 5.02 pounds VOC per gallon of coating (excluding water) at application, and that each topcoat GM used exceeded the 2.8 pounds emission limit in 310 CMR § 7.18(7). GM used these topcoatings on a total of 124 days during this period. The data also show that during this period GM used final repair coatings with an arithmetic average VOC content of 6.18 pounds VOC per gallon of coating (excluding water) at application, and that each final repair coating GM used exceeded the 4.8 pound emission limit in 310 CMR § 7.18(7). GM used these final repair coatings on a total of 124 days during this period. GM's use of these coatings caused VOC emissions from the topcoating and final repair operations in excess of those allowed under 310 CMR § 7.18(7), as approved by EPA.

Based on the foregoing, I hereby find General Motors to be in violation of the SIP requirement at 310 CMR § 7.18(7), as approved by EPA.

ENFORCEMENT

General Motors has thirty days to correct the violations cited above. If the violations continue beyond the thirtieth day from the date of receipt of this Notice, EPA may issue General Motors an Administrative Order requiring compliance with the applicable SIP, 310 CMR § 7.18(7), as approved by EPA, or may bring a civil action in federal district court for an injunction and/or monetary penalties of up to $25,000 per day of violation. See Section 113(b) of the Act, 42 U.S.C. § 7413(b). Furthermore, if General Motors knowingly violates the applicable SIP requirement, 310 CMR § 7.18(7), as approved by EPA, then under Section 113(c) of the Act, 42 U.S.C. § 7413(c), General Motors, its officers and/or employees may be subject to criminal penalties of up to $25,000 per day of violation and/or imprisonment for not more than one year.

OPPORTUNITY TO CONFER

General Motors may confer with EPA concerning this Notice and the findings on which it is based. To schedule a conference, please contact attorney Timothy Williamson at (617) 565-3350 within one week of receipt of this Notice. General Motors has the right to be represented by counsel at the conference.

REPORTING REQUIREMENT

Pursuant to Section 114(a)(1) of the Act, 42 U.S.C. § 7414(a)(1), beginning September 10, 1986 GM is hereby required to submit the following information within 10 days of the beginning of each month, until EPA terminates this requirement:

1. A written statement including:

   a. for each day of the previous month, the arithmetic average VOC content of topcoatings applied at the

   facility, expressed in pounds VOC per gallon of coating excluding water at application;

   b. for each day of the previous month, the arithmetic average VOC content of final repair coatings applied at the facility, expressed in pounds VOC per gallon of coating excluding water at application;

   c. the total amount of coating used for topcoating during the previous month, expressed in gallons; and

   d. the total amount of coating used for final repair during the previous month, expressed in gallons.

2. For each coating used during the previous month but for which GM has not previously submitted coating content data, the coating content data needed to complete the VOC Data Sheet on Pages II-2 and III-2 and III-3 of EPA document EPA-450/3-84-019, a copy of which is attached.

The information required above shall be certified in writing by an appropriate official and shall be submitted to the following addresses:

Louis F. Gitto, Director
Air Management Division
U.S. Environmental Protection Agency
Region I (APC-2311)
John F. Kennedy Federal Building
Boston, MA 02203

ATTN: Catherine Ehlhardt

and

Michael Maher, Chief
Northeast Region
Department of Environmental
Quality Engineering
5 Commonwealth Street
Woburn, MA 01801

Under Section 113(b)(4) of the Act, failure to comply with or provide the information required pursuant to this request may result in further enforcement action. You should also be aware that Section 113(c)(2) provides for possible criminal penalties for anyone who knowingly makes any false statement, representation, or certification in a response to an EPA reporting requirement.

GM may assert a business confidentiality claim covering part or all of the information required, in the manner described by 40 C.F.R. § 2.203(b). Information covered by such a claim will be disclosed by EPA only to the extent, and by means of the procedures, set forth in 40 C.F.R. Part 2, Subpart B. If no such claim accompanies the information when EPA receives it, the information may be made available to the public without further notice to GM. GM should read the above-cited regulation carefully before asserting a business confidentiality claim, since certain categories of information are not properly the subject of such a claim. For example, the Clean Air Act provides that "emission data" shall in all cases be made available to the public. See 42 U.S.C. § 7414(c).

EFFECTIVE DATE

This notice shall become effective upon its receipt by General Motors. If General Motors has any questions regarding this matter, please contact attorney Timothy Williamson at (617) 565-3350 or engineer Catherine Ehlhardt at (617) 565-3262.

/s/ Michael R. Deland — 8/14/86
Michael R. Deland — Date
Regional Administrator

5. Affidavit of John L. Hanisch (October 21, 1987)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 87-2068 MC

UNITED STATES OF AMERICA,
Plaintiff,

v.

GENERAL MOTORS CORPORATION.
Defendant.

City of Boston
County of Suffolk
Commonwealth of Massachusetts

AFFIDAVIT OF JOHN L. HANISCH

John L. Hanisch, being duly sworn, states as follows:

1. Since March 2, 1986, I have served as Chief of the State Air Programs Branch of the Environmental Protection Agency ("EPA") Region I. EPA Region I covers the six New England States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. My responsibilities include oversight and management of the development of State Implementation Plans ("SIPs") pursuant to Section 110 of the Clean Air Act, 42 U.S.C. § 7410 (the "Act"), and the enforcement of these SIPs, pursuant to Sections 113 and 120 of the Act, 42 U.S.C. §§ 7413 and 7420.

2. From March 1980, to March 2, 1986, I served as Chief of the State Air Programs Section ("SAPS") of EPA Region I. My responsibilities included oversight and management of the development of SIPs for the Region I

states. The Deputy Regional Administrator has approved a reorganization which renames the SAPS the Planning and Technological Evaluation Section ("PTES").

3. This affidavit is submitted in connection with *United States of America v. General Motors Corporation*, USDC D. Mass., Civil Action No. 87-2068 MC. I have personal knowledge of the facts contained in this affidavit.

II. EPA Region I SIP Approval Process

4. In EPA Region I, when a state develops a SIP for EPA's approval under Section 110(a)(2) of the Act, 42 U.S.C. § 7410(a)(2), the state submits that SIP to Region I's Air Management Division ("AMD"). AMD transmits most of these SIPs to the PTES for reveiw. The state also submits to the AMD and PTES any proposed revision to a SIP requiring EPA approval under Section 110(a)(3)(A) of the Act, 42 U.S.C. § 7410(a)(3)(A).

5. When the Region I PTES receives a proposed SIP revision, it first determines whether the state's submission is administratively and technically complete. If not, EPA returns the proposal to the state for completion. Once the PTES has a complete submission of a proposed SIP revision, PTES, in conjunction EPA Region I Office of Region Counsel, must conduct a review of the proposal and make technical and legal findings to determine whether the proposal meets the requirements of the Act. A typical SIP revision for a single source of volatile organic compounds ("VOC") in an ozone nonattainment area requires that PTES determine whether:

a. The proposed compliance schedule in the SIP revision is as expeditious as practicable, which requires examining the proposed technology, alternate technologies, and the special circumstances at the source;

b. The proposed SIP revision will protect reasonable further progress toward attainment of

the national ambient air quality standard, which requires an analysis of the state's reported reduction in VOC emissions and the impact the proposed revision would have on those reductions;

c. The proposed SIP revision is enforceable, which requires a technical and legal review of the wording of the State's compliance schedule and any state order which is part of the SIP revision;

d. The proposal contains adequate monitoring, recordkeeping, and reporting requirements to enforce compliance, which requires a case-by-case examination of a source's manufacturing process to determine the most accurate way of measuring VOC emissions that is not unreasonably burdensome using EPA approved methods;

e. The state held a public hearing on the proposal after at least thirty days public notice; and

f. The proposal provides for the implementation of reasonably available control technology which requires a comparison of the source's proposed control technology with the control technology of which EPA is aware for other sources in that category.

6. Once the PTES has made the findings outlined in ¶ 5, above, the PTES drafts a notice of proposed rulemaking ("NPR") for the *Federal Register*, a technical support document, and an internal briefing memorandum. The Regional Administrator of Region I must sign this package before the PTES sends it to EPA Headquarters in Washington, D.C. and to the Office of Air Quality Planning and Standards ("OAQPS") in Research Triangle Park, Durham, North Carolina. Internal EPA guidance requires that PTES

send out the draft NPR within five months after the date PTES receives a complete package from the state.

7. After review and approval at EPA Headquarters and OAQPS the NPR is published in the *Federal Register*. The accompanying affadivit describes EPA Headquarters and OAQPS review of the NPR before its publication in the *Federal Register*.

8. In most cases, the public then has thirty days to comment on EPA's proposed approval or rejection of the SIP revision. In the case of complicated or controversial proposals, EPA may extend that comment period. After the comment period closes, the PTES must review each comment and address the comment in a final rulemaking notice ("FRN"). The PTES must investigate any new information received in the comments and prepare a rational response to each comment. The PTES then prepares a draft FRN for publication in the *Federal Register*, a technical support document, and an internal briefing memorandum. The Regional Administrator must again sign off on this package before the PTES sends it to EPA Headquarters and OAQPS for review. EPA's Administrator must sign the FRN before EPA publishes it in the *Federal Register*. Internal EPA guidance requires that the PTES send out the draft FRN within five months after the date the comment period on the NPR closes.

9. In the past three years, Region I PTES has processed an average of thirty-five SIP actions or revisions each fiscal year. In fiscal year 1985, PTES processed about twenty proposed SIP revisions, in 1986 PTES processed thirty, and in 1987 PTES processed fifty-six.

III. EPA Region I SIP Enforcement Process

10. The State Air Programs Branch contains not only the PTES, but also the Control Technology and Compliance Section ("CTCS"). The CTCS is responsible for enforcing the emission limits and requirements EPA has approved

into Region I's SIPs and for overseeing the states' enforcement of the SIPs. Part of the CTCS's enforcement program involves developing cases to be filed under Section 113(b) of the Act, 42 U.S.C. § 7413(b), to bring sources into compliance with SIPs and to collect civil penalties for SIP violations. EPA views its ability to collect such penalties as a critical element of its enforcement program. The CTCS operates under EPA guidance requiring it to collect substantial civil penalties from SIP violators in all but the most rare cases. Further, EPA has developed a Clean Air Act Civil Penalty Policy to guide the Agency in imposing penalties which will provide appropriate incentives for sources to comply with the SIPs.

11. Since January 1, 1985, the CTCS has issued twenty-four notices of violation ("NOVs") to sources violating VOC emission limits in Region I SIPs. Of these twenty-four cases, six involved sources for which the state was developing a proposed SIP revision to relax the source's emission limit or for which the state had already submitted to EPA a proposed SIP revision doing so. If preliminary review of a proposed SIP revision applicable to a source violating the SIP indicates that the revision appears to be approvable, and that the source would be in compliance with the SIP as revised, EPA guidance allows the CTCS to forbear from further enforcement action after issuing the NOV. Otherwise CTCS is obligated to enforce the original emission limits in the unrevised SIP.

IV. DEQE's Proposed SIP Revision for General Motor's Framingham Plant

12. On December 30, 1985, the Massachusetts Department of Environmental Quality Engineering ("DEQE") submitted to PTES a proposed revision to the SIP provisions applicable to the surface coating lines at the General Motors ("GM") automobile assembly plant in Framingham, Massachusetts. On May 30, 1986, DEQE requested that EPA Region I delay action on this proposed SIP revision

until June 20, 1986. A true copy of DEQE's letter from my files is attached to this Affidavit as Attachment A. On July 2, 1986 Region I sent a draft NPR proposing to disapprove DEQE's SIP revision for GM to EPA Headquarters and OAQPS. THE NPR was published in the *Federal Register* on December 2, 1986. A true copy of the NPR from my files is attached to this Affidavit as Attachment B. The comment period on EPA's proposed disapproval closed on January 2, 1987. On June 30, 1987, Region I sent a draft FRN to EPA Headquarters and OAQPS responding to comments on EPA's proposed disapproval and finally disapproving DEQE's SIP revision for GM.

13. According to air quality monitoring data available to me from OAQPS, sixty-two metropolitan areas in the United States failed to meet the National Ambient Air Quality Standard for ozone during the period from 1984 through 1986. Seventeen of these areas are on the Eastern Seaboard, Washington, D.C. and north.

/s/ John L. Hanisch
John L. Hanisch

Signed and sworn to before me on this 21st day of October, 1986.

/s/ Evelyn M. Sullivan
Notary Public

My commission expires:
July 28, 1989

a. Attachment A: Letter from Bruce K. Maillet to Lou Gitto (May 30, 1986)

The Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Environmental Quality Engineering
Division of Air Quality Control
One Winter Street, Boston 02108

S. RUSSELL SYLVA
Commissioner

May 30, 1986

Mr. Lou Gitto
Director
Air Division
U.S.E.P.A.
John Fitzgerald Kennedy Building
Boston, MA 02108

Dear Mr. Gitto:

As you are aware, we are negotiating and administrative order under Regulation 310 CMR 7.18 with General Motors Corporation and your office which will be a Delayed Compliance Order (DCO) under the clean air act. This action would eliminate the need for a revision to the Massachusetts State Implementation Plan.

The draft DCO has been reviewed by DEQE, EPA and GM and attorneys for each party are scheduled to confer by telephone on June 2, 1986. I believe Tim Williamson of U.S.E.P.A. will represent you.

In this regard, it would be appropriate for you to delay action on our SIP revision request until June 20, 1986 to allow time to finalize the Delayed Compliance Order. Please consider this a request for such a delay since a DCO will be an easier action to achieve and will accomplish the same result as the proposed SIP revision.

Very truly yours,
/s/ Bruce K. Maillet
Bruce K. Maillet
Director

BKM/efg.

cc: General Motors
Doug Shallcross

b. Attachment B: EPA, "Approval and Promulgation of Implementation Plans; Massachusetts; Automobile Surface Coating," 51 Fed. Reg. 43394 (1986)

40 CFR Part 52

[FRL-3120-3]

Approval and Promulgation of Implementation Plans; Massachusetts; Automobile Surface Coating

AGENCY: Environmental Protection Agency [EPA].

ACTION: Proposed rule.

SUMMARY: EPA is proposing to disapprove a State Implementation Plan revision submitted by the Commonwealth of Massachusetts. The revision requests an extension of the final compliance dates for topcoating and final repair coating of automobiles from December 31, 1985 to August 31, 1987. General Motors in Framingham, Massachusetts is the only automobile surface coating source in the State. This action does not change the final emission limits at the General Motors plant nor will it increase or decrease emissions.

The intended effect of this action is to ensure reasonable further progress towards the attainment of the ozone standard by the Massachusetts demonstration date of December 31, 1987.

DATES: Comments must be received on or before January 2, 1987. Public comments on this document are requested and will be considered before taking final action on this SIP revision.

ADDRESSES: Comments may be mailed to Louis F. Gitto, Air Management Division, Room 2311, JFK Federal Bldg., Boston, MA 02203. Copies of the submittal and EPA's evaluation are available for public inspection during normal business hours at the Environmental Protection Agency, Room 2311, JFK Federal Bldg., Boston, MA 02203 and

the Department of Environmental Quality Engineering, Division of Air Quality Control, One Winter Street, 8th Floor, Boston, MA 02108.

FOR FURTHER INFORMATION CONTACT: Cynthia L. Greene (617) 565-3248; FTS 835-3248.

SUPPLEMENTARY INFORMATION: On December 30, 1985, S. Russell Sylva, Commissioner of the Department of Environmental Quality Engineering (DEQE), submitted a revision to the Massachusetts State Implementation Plan (SIP). The revision to the automobile surface coating regulation (310 CMR 7.18(7)) requests an extension of the final compliance dates from December 31, 1985 to August 31, 1987 for the topcoat and final repair applications.

Background

On September 16, 1980 (45 FR 61293), EPA approved Massachusetts Regulation 310 CMR 7.18(7) which contained the following schedule for compliance with the topcoat and final repair reasonable available control technology (RACT) emissions limitations. The topcoating application limitations were 5.8 lbs VOC/gallon of coating, minus water, by December 31, 1979; 5.0 lbs VOC/gallon of coating, minus water, by December 31, 1982; and 2.8 lbs VOC/gallon of coating, minus water, by December 31, 1985. The final repair application limitation was 4.8 lbs of VOC/gallon of coating, minus water, by December 31, 1985. These dates were consistent with a nationally developed schedule for achieving reductions from the automobile surface coating industry.

On June 7, 1985, GM informed the DEQE that it intended to meet the 2.8 lbs VOC/gallon of coating, minus water, for topcoat and 4.8 lbs VOC/gallon of coating, minus water, emissions limitations by modifying its plant to use basecoat/clearcoat enamel coatings and by the installation of incinerators on the topcoat ovens. GM requested an extension of the final compliance date from December 31, 1985 to December 31, 1987 (changed to August 31, 1987 after DEQE's review of the permit application) in order to complete its major modification. General Motors submitted proposed plans, in a new source review, air permit application for the major modification, on August 7, 1985.

The Revision

The DEQE submitted this extension revision based on EPA's policy statement of October 20, 1981 (46 FR 51366) which established criteria that the Agency uses to review modifications to existing SIP compliance schedules for automobile paint shop operations. EPA evaluated this submittal based on the established criteria and has determined that it does not meet several of the established criteria for the following reasons.

Review of SIP Revision Relative to 46 FR 51366 Criteria

1. The purpose of the October 20, 1981 **Federal Register** policy statement was to allow deferral of the compliance dates for paint shop operations so that more cost-effective control methods could be implemented.

EPA Evaluation: In order to meet the emission limits, General Motors is modifying its plant by constructing a new paint shop capable of topcoating cars with basecoat/clearcoat enamel coatings and controlling the topcoating oven emissions with incinerators. The State did not document that the construction of new paint shop lines and installation of incinerators would be a more cost-effective control method than the installation of abatement equipment on the existing lacquer topcoating lines.

2. Any deferral of the compliance dates was still required to assure continued compliance with section 172 of the Clean Air Act (CAA) to implement reasonable available control technology (RACT) as expeditiously as practicable.

EPA Evaluation: General Motors did not document that it was impracticable for the company to meet the existing

compliance date using incineration on the existing lines or on lines modified to accommodate the basecoat/clearcoat technology. Based on experience at other plants, EPA believes that such technology existed long enough before the end of 1985 to permit General Motors to install the basecoat/clearcoat technology before that date. Instead, however, General Motors did not decide on its control method until June 7, 1985 when it requested, in a letter to DEQE, an extension until December 31, 1987. General Motors' 1985 request for an extension, only six months from the final compliance date and at least three years after the availability of the basecoat/clearcoat technology, under a policy statement that was published in 1981, cannot be considered implementing reasonably available control technology as expeditiously as practicable.

3. Additionally, EPA's 1981 policy stated that postponement of the compliance dates would be allowed for further development of coating technology.

EPA Evaluation: The basecoat/clearcoat technology and incineration technology have already been developed, and General Motors has not documented, that with the technology it intends to use in Framingham, it needs two additional years for technology development.

4. Under EPA's policy, an increase in the amount of emissions from the source is not allowed during deferral of the compliance dates.

EPA Evaluation: The DEQE SIP submittal predicts that General Motors' emissions during the deferral would increase above the 1984 actual emissions, thus making it ineligible for the deferral.

5. The policy states that any modifications must be designed to be capable of subsequent adoption of a new generation of low solvent coatings.

EPA Evaluation: The State has not demonstrated that General Motors' new basecoat/clearcoat lines will be capable of implementing low solvent technology.

6. Each revision has to be evaluated for its impact on the overall State Implementation Plan, including emission reductions necessary to demonstrate reasonable further progress (RFP) toward attainment of the ozone standard.

EPA Evaluation: The entire Commonwealth of Massachusetts is nonattainment for ozone, with an attainment deadline of December 31, 1987. Massachusetts experienced 14 days of violations of the ozone standard during the 1985 ozone season.

7. The DEQE stated in its response to comments given at the public hearing, that General Motors' emissions would not affect the State's ability to demonstrate a 35% reduction in emissions of volatile organic compounds (VOCs). (VOCs are precursors to ozone.) This percentage was used in the 1982 SIP to demonstrate attainment with the ozone standard in the Boston Air Quality Control Region.

EPA Evaluation: The DEQE did not submit a complete RFP demonstration with the compliance status of VOC sources and graphs representing annual linear reductions. A complete RFP report is needed to support the DEQE's claim that the ozone primary standard for protecting public health will be attained by the end of 1987 despite the compliance date extension for General Motors and that RFP will be achieved in the interim. Based on the number of ozone violations and their magnitude, EPA believes that there is some evidence that Massachusetts will continue to experience violations of the standard beyond December 31, 1987.

Therefore, EPA is proposing to disapprove the proposed revision to the Massachusetts State Implementation Plan, submitted on December 30, 1985, extending the final com-

pliance dates for the topcoat and final repair applications under the automobile surface coating regulation.

EPA is soliciting public comments on issues discussed in this notice or on other relevant matters. These comments will be considered before taking final action. Interested parties may participate in the Federal rulemaking procedure by submitting written comments to the address above.

Proposed action

EPA is proposing to disapprove the SIP revision to the Massachusetts automobile surface coating regulation, 310 CMR 7.18(7), to extend the topcoat and final repair applications final compliance dates.

This disapproval will prevent GM from deferring the topcoat and final repair compliance dates (from December 31, 1985 to August 31, 1987 by revising the State regulation. Extensions of the December 31, 1985 date should instead be obtained through an enforcement mechanism.

Under 5 U.S.C. 605(b), I certify that this SIP revision will not have a significant economic impact on a substantial number of small entities because it affects only one source. In addition, this action imposes no additional requirements on the source.

Under Executive Order 12291, today's action is "Major." It has been submitted to the Office of Management and Budget (OMB) for review.

List of Subjects in 40 CFR Part 52

Air pollution Control, Ozone.

Dated: July 1, 1986.

Michael R. Deland,

Regional Administrator, Region I.

[FR Doc. 86-27030 Filed, 12-1-86; 8:45 am]

BILLING CODE 6560-50-M

6. Declaration of John J. Silvasi (October 21, 1987)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 87-2068 MC

UNITED STATES OF AMERICA,
Plaintiff,

v.

GENERAL MOTORS CORPORATION,
Defendant

Declaration of John J. Silvasi

John J. Silvasi, declares as follows:

I. Background

1. I am employed by the United States Environmental Protection Agency. I work within the Office of Air & Radiation's Office of Air Quality Planning and Standards ["OAQPS"] in the Control Programs Development Division ["CPDD"]. Within CPDD, I serve as the Chief of the Plans Analysis Section. I have held this position since June 9, 1985.

2. The duties of the Control Programs Development Division include serving as the lead Office for EPA Headquarters review of SIP revisions which have been submitted to EPA Regional Offices by state or local agencies. Within the Division, the Plans Analysis Section has lead responsibility for coordinating Headquarters-level review of SIP revisions.

3. This affidavit is being submitted in connection with the United States' response to General Motors' motion to dis-

miss in *United States of America* v. *General Motors Corp.*, United States District Court for Massachusetts, C.A. No. 87-2068 MC.

II. Current EPA Headquarters SIP Revision Review Process

4. After a Regional Office has completed working on a SIP revision with the state or local agency which has submitted it to EPA, it prepares a draft proposed rulemaking package which is forwarded to EPA Headquarters for review and concurrence.

5. Headquarters review is not a perfunctory process. It is vitally important to ensure that EPA action on SIP revisions will be in conformity with nationally applicable legal and policy requirements. As a result, each SIP revision package must be reviewed for national consistency, technical sufficiency, and regulatory interpretation.

6. EPA Headquarters review of a typical SIP revision package entails the following. Within OAQPS, the CPDD reviews for consistency with national regulations and policy, and the Stationary Source Compliance Division reviews for national consistency respecting compliance and enforcement issues. In addition, two other OAQPS divisions may review SIP revision packages in given instances: the Monitoring and Data Analysis Division reviews any necessary modeling analyses, and the Emissions Standards and Enfgineering Division reviews the technical sufficiency of any proposed emissions controls.

The Office of General Counsel reviews for legal sufficiency. Typically, OAQPS and OGC will coordinate their comments, communicate them to the Regional Office, and assist the Regional Office in attempting to resolve issues which have been raised. The Regional Office staff redrafts portions of the Federal Register Notice and other portions of the package, as appropriate, in accordance with the Headquarters comments. The Regional staff then obtains

the Regional Administrator's concurrence on the revised package, and resubmits the package to Headquarters for final clearance.

7. Because of the complexity of the issues which are often involved, experience has shown that case-by-case national review of SIP revisions is necessary. Also, because issues are subject to significant change during the time period when the Regional Office is working with the relevant state or local agency on the SIP revision, concurrent Headquarters and Regional review is impractical. To expedite matters as much as possible, Headquarters personnel are often consulted by Regional offices in the period prior to the submission of a rulemaking package to Headquarters.

8. After a Regional Office has completed its review of the comments submitted on a proposed SIP revision rulemaking, it prepares a draft final rulemaking package which it submits for Headquarters review and concurrence. Headquarters review of the package generally proceeds as outlined above in Paragraph 6. With respect to the final rulemaking package, however, the emphasis is on ensuring that all recommendations, conditions, and requests for information set forth in the proposed rulemaking have been completed, and that all comments raised during the comment period on the proposed rulemaking have been adequately treated. In addition, the final package must be reviewed and signed by the EPA Administrator.

9. EPA has established as its goal that Headquarters review of SIP revision packages be accomplished within 2 months for both proposed rulemakings and final rulemakings. Due to the number of SIP revisions which must be processed and to staffing constraints, these target timeframes often cannot be met. The number of SIP revisions submitted annually to EPA Headquarters during the 1983 to 1987 time period averaged between 175 and 200. The resources allocated to EPA Headquarters review of SIP revisions currently consists of the equivalent of 12 full time

positions. EPA has recently promulgated a new National Ambient Air Quality Standard for particulate matter pursuant to Section 107 of the Clean Air Act. In addition, the Agency is considering requiring significant revisions to many state VOC SIP's due to the the failure of numerous areas to achieve the NAAQS for ozone by December 31, 1987. As a result, the number of SIP revisions needing to be processed at EPA Headquarters will probably significantly increase in the near future.

III. DEQE's Proposed SIP Revision for General Motor's Framingham Plant

10. The draft proposed rulemaking package for the SIP revision submitted by the Massachusets DEQE for General Motors' Framingham, Massachusetts plant on December 30, 1985 was logged in at the Office of Air Quality Planning and Standards on July 22, 1986. The Notice proposing disapproval of the SIP revision appeared in the Federal Register on December 2, 1986.

11. The draft final rulemaking package for the Framingham plant SIP revision was logged in at the Office of Air Quality Planning and Standards on July 13, 1987. The package is currently proceeding through the Headquarters review process.

Further declarant sayeth naught.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 21st day of October, 1987.

/s/ John J. Silvasi
John J. Silvasi

7. Declaration of Bruce A. Armstrong (October 22, 1987)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civ. Action No. 87-2068 MC

UNITED STATES OF AMERICA,
Plaintiff,

v.

GENERAL MOTORS CORPORATION,
Defendant

Declaration of Bruce A. Armstrong

1. I am employed by the United States Environmental Protection Agency. I work as an environmental engineer in the Office of Policy Analysis and Review, which is a staff office in the Office of the Assistant Administrator for Air and Radiation.

2. My duties include monitoring and coordinating the progress through EPA Headquarters of SIP revision rulemaking packages once they have cleared the Office of Air Quality Planning and Standards.

3. This declaration is being submitted in connection with the United States' response to General Motors' motion to dismiss in *United States of America v. General Motors Corp.*, United States District Court for Massachusetts, C.A. No. 87-2068 MC.

4. The rulemaking package finally disapproving the SIP revision submitted by the Massachusetts Department of Environmental Quality Engineering for the General Motors Framingham, Massachusetts plant has completed staff level Headquarters review and awaits final concurrence.

Further declarant sayeth naught.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 22nd day of October, 1987.

/s/ Bruce A. Armstrong
Bruce A. Armstrong

8. EPA, "Guidance on Processing SIP Revisions (And 111(d) Plans)" (excerpts)

United States Environmental Protection Agency

Office of Air Quality
Planning and Standards
Research Triangle Park NC

Air

Guidance on Processing SIP Revisions (And 111(d) Plans)

TABLE OF CONTENTS

	Page
FOREWORD	i
TABLE OF CONTENTS	ii
LIST OF FIGURES AND TABLES	iv
ACRONYMS AND GLOSSARY	v
INTRODUCTION	vi
I. DEVELOPING THE SIP PACKAGE AT THE REGIONAL OFFICE	I-1
A. Determination of the Type of Action	I-2
1. Type of Notice	I-2
2. Category of Processing (Major/Minor)	I-3
B. Action Memorandum	I-5
C. *Federal Register* Notice	I-9
1. Body of the Preamble	I-9
2. Summary of Action	I-11
3. Regulatory Flexibility Act language	I-11
4. Executive Order 12291 language	I-12
5. Petition language	I-13
6. Thesaurus terms	I-13
7. Incorporation by reference certification	I-14
8. Authority Citation	I-14
9. Signature and Date	I-14
10. Rulemaking pages (Parts 52, 62 and 81)	I-15
D. State submittal	I-18
E. Technical Support Document	I-18
F. Communications Strategy	I-20
G. OMB forms	I-21

H. Typesetting Request form	I-22
I. Material for Incorporation by reference	I-23
J. OFR Transmittal Memorandum	I-27
I. Checklist	I-28
L. Part D Docket	I-30
M. Distribution Matrices	I-32
II. HEADQUARTERS REVIEW	II-1
A. SIP Package Distribution	II-1
B. Roles and Responsibilities of Headquarters Offices	II-2
1. Office of General Counsel	II-2
2. Office of Air and Radiation	II-5
a. OAQPS	II-5
b. OMS	II-6
c. OPMO	II-7
3. Office of Policy, Planning, and Evaluation	II-7
a. OSR	II-7
b. OPA	II-8
c. OARM	II-8
4. Office of Management & Budget	II-8
C. SIP Concurrence Process	II-9
1. Review periods	II-9
2. Headquarters SIP processing contacts	II-10
3. Negotiation process	II-11
III. SIP ACCOUNTABILITY AND TRACKING (THE 5-2/5-2 CLOCK)	III-1
IV. LISTING OF NAMES AND TELEPHONE NUMBERS	IV-1
A. Regional SIP Reviewers	IV-1
B. Regional Air Branch Chiefs	IV-5

C. Regional SIP Processing Contacts IV-6
D. Headquarters SIP Reviewers IV-7
E. Control Programs Operations Branch Specialization Contacts IV-10
F. Committee Membership IV-11
G. Headquarters SIP Reviewing Office Addresses IV-12

V. COMPILATION OF THE FEDERALLY-APPROVED SIP V-1

APPENDICES

A. Direct Final Rulemaking; example withdrawal notice ..... A
B. Parallel Processed Rulemaking; boilerplate ..... B
C. Abbreviate Final Rulemaking—example . C
D. Standardized sections—example language ..... D
E. Policy on Taking No Action ..... E
F. Example TSD ..... F

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III. SIP ACCOUNTABILITY AND TRACKING (THE 5-2/5-2 CLOCK)

A. Accountability

In 1981, a new tracking and accountability system was established. Its purpose is to insure a relatively timely response to State-initiated SIP revisions. In the majority of cases the following scenario applies: Each Regional Office (RO) has 5 months from the time it receives a complete SIP revision from a State to analyze the package, prepare a Notice of Proposed Rulemaking (NPR) (described in Chapter I) and transfer review responsibility to EPA Headquarters (HQ). Headquarters has 2 months to review the notice for national consistency, obtain the concurrence of the Assistant Administrator for Air and Radiation (AA for OAR) and the Office of Management and Budget (OMB) (if necessary) and publish it in the *Federal Register* (FR) for public comment. (Described in Chapter II).

The clock reverts to the RO upon publication. The RO has 5 months from that date to review and respond to public comments, prepare a Final Rulemaking Notice (FRN) and transfer responsibility to HQ. In situations where revisions are being parallel processed, the second 5 months begins when the final submittal is received or the NPR is published, whichever is later. EPA HQ then has 2 more months to review the document for national consistency, obtain the concurrence of the AA for OAR and OMB (if necessary), obtain the Administrator's signature and publish the FRN in the *Federal Register*.

During the HQ review period it is possible that the SIP package may be placed back on the RO clock. The following list is not intended to indicate all possible situations where the responsibility would shift back to the RO. However, some examples include:

A. When significant portions or all of the notice must be rewritten. Often it may need more in-depth discussion of an issue and the HQ staff may help draft the changes. Sometimes a Direct Final action must be rewritten as an NPR.

B. When additional information or specific commitments in writing must be obtained from the State.

C. When an RO action is inconsistent with national policy.

D. When material for IBR remains incorrect after the RO has had a chance to correct it.

E. When a SIP package neither includes a communications strategy or a negative declaration.

Regional Office and HQ personnel should attempt to keep CPDD-W fully informed of their discussions on each package. A case-by-case determination will be made on whose clock the package rests. Generally, of the RO contact indicates that the change will only take a couple of days, the package will remain on the HQ clock. If, however, delays occur beyond that period, CPDD-W will return the package to the RO clock, AS OF THE DATE IT WAS ORIGINALLY INFORMED OF THE NEED FOR A REWRITE OR ADDITIONAL INFORMATION, by placing a call to the appropriate RO Section Chief.

In other cases when problems arise, CPDD-W will determine on whose clock the package should be. If there are national policy issues which need to be addressed, the SIP should be on the HQ clock. In general, where an action proposed by an RO is consistent with existing national policy, the responsibility for any delay belongs to Headquarters. If sufficient guidance has been provided by HQ to fully explain the issues and the steps necessary to resolve the problem, the clock will revert to the RO. Often, problems that require a SIP package to be returned to the RO clock can be avoided by direct discussion between

RO and HQ staff during the RO's review of the State submittal and development of the notice. Regional Office contacts should attempt to initiate these conversations more frequently.

B. Tracking

1. CPDD-W Tracking

CPDD-W is responsible for managing the HQ SIP accountability and tracking system.

CPDD-W will provide each Headquarters review office and Regional Office weekly computerized status reports of all SIP packages undergoing Headquarters review. The report will also indicate which offices have yet to concur on each SIP action.

CPDD-W will provide each Headquarters review office weekly reports which list by office those SIP's on which it has yet to concur.

CPDD-W will track and provide each Headquarters review office and Regional Office a report on action items resulting from Standing SIP Committee Meetings.

CPDD-W will provide senior program management, each Headquarters review office and each Regional Office a formal report as of the midpoint and end of the quarter on the status of SIP packages being processed in Headquarters, and on any problems that are delaying SIP packages.

2. CPDD Tracking

CPDD is responsible for tracking the status of SIP revisions in the Regions and reporting the status to the SPMS accountability system on a quarterly basis. The status report will cover the time interval between receipt in the RO and receipt of the package in Headquarters.

SIP revisions should be reported to CPDD within 2 weeks of receipt in the RO.

The 5 month date for proposals will start on the date that the revision is received in the RO.

The receipt of additional data or material pertaining to a revision will not change the original submittal date.

For revisions that have been recorded in CPDD's records, the RO will notify CPDD in writing if a revision has been withdrawn (returned to the State) with a brief statement as to the reason. CPDD will enter into the computer "incomplete returned to State." The revision will not be counted as overdue and will be given a new submittal date when the State returns the revision to the RO.

If it is anticipated that a package may not be resubmitted at all, the RO should advise CPDD to delete the revision.

The RO has 5 months from the date of publication of the proposed rulemaking to submit a final rulemaking unless it is being parallel processed. In this case, the second 5 months begins on the later of two actions: the submittal of the adopted SIP or publication of the NPR.

In circumstances in which CPDD-W transfers a SIP package from the HQ clock to the RO clock, the revisions included in the package will be counted as overdue when the original 5 month time period expires. It shall be the Region's responsibility to arrange with CPDD-W the removal of packages from their clock. CPDD-W will notify CPDD concerning the removal of packages from the RO clock.

CPDD will send each RO, on a monthly basis, a SIP status report listing those revisions that are currently overdue and those that are due by the end of the current quarter. In addition, each RO will be contacted approximately 10 days prior to the end of the quarter and informed of those revisions that will be overdue (including those on the RO clock) on the SPMS report. It shall be

the responsibility of the RO to contact CPDD regarding corrections to the overdue list (including publication dates).

The overdue list must be reported to SPMS on the 10th day of the month following the end of the quarter unless notified otherwise.

9. First Amended Complaint

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 87-2068 MC

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL MOTORS CORPORATION,

Defendant.

FIRST AMENDED COMPLAINT

Plaintiff, the United States of America ("United States"), at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges as follows:

NATURE OF ACTION

1. This is a civil action pursuant to Section 113(b) of the Clean Air Act ("the Act"), 42 U.S.C. § 7413(b), seeking civil penalties for emissions of volatile organic compounds ("VOC") in violation of the Massachusetts State Implementation Plan and the Act.

JURISDICTION AND VENUE

2. This court has jurisdiction over the subject matter of this action pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1331, 1345, and 1355.

3. Venue is proper in this District pursuant to 42 U.S.C. § 7413(b) and 28 U.S.C. § 1391(b) and (c) because the

alleged violations took place in the District of Massachusetts and because the Defendant is licensed to do business and is doing business in Massachusetts.

4. Authority to bring this action on behalf of the EPA Administrator is vested in the United States Department of Justice pursuant to Section 305 of the Act, 42 U.S.C. § 7605.

5. Notice of the commencement of this action has been given to the Massachusetts Department of Environmental Quality Engineering ("DEQE") in accordance with Section 113(b) of the Act, 42 U.S.C. § 7413(b).

DEFENDANT

6. Defendant, General Motors Corporation ("General Motors"), is a Delaware corporation authorized to do business in Massachusetts, with its principal place of business in Detroit, Michigan. General Motors is a "person" as defined in Section 302(e) of the Act, 42 U.S.C. § 7602(e).

7. General Motors owns and operates an automobile assembly and painting facility located in Framingham, Massachusetts (the "Framingham plant"). From at least 1980 to about July 1987, automobiles were painted at the Framingham plant by a process that included a topcoating step and, when necessary, a final repair coating step. The topcoatings and final repair coatings that were used at the Framingham plant during this period contained VOCs which were emitted into the atmosphere during the surface coating process. In about July 1987, operation of the automobile surface coating facilities previously owned and operated by General Motors at the Framingham plant (hereinafter "the lacquer coating lines") was terminated.

STATUTORY AND REGULATORY FRAMEWORK

8. Section 109(a) of the Clean Air Act, 42 U.S.C. § 7409(a), requires the Administrator of EPA ("the Ad-

ministrator") to promulgate primary and secondary National Ambient Air Quality Standards ("NAAQS") for any air pollutant for which air quality criteria are issued. The primary standard must be designed "to protect the public health" with "an adequate margin of safety." 42 U.S.C. § 7409(b)(1). The secondary standard must be sufficient "to protect the public welfare from any known or anticipated adverse effects" of the pollutant. 42 U.S.C. § 7409(b)(2).

9. On February 8, 1979, the Administrator promulgated, pursuant to Section 109, a combined primary and secondary NAAQS for the photochemical oxidant know as ozone, which standard is codified at 40 C.F.R. § 50.9.

10. To achieve the NAAQS for ozone, Section 110(a) of the Act, 42 U.S.C. § 7410(a) requires each State to promulgate and submit to EPA for approval a State Implementation Plan ("SIP") containing regulations for reducing emissions of air pollutants from sources within the State that contribute to ozone formation. Each SIP is federally enforceable, if approved. Each SIP is to achieve and maintain the NAAQS within an established time limit, 42 U.S.C. § 7410, which in most cases must be no later than December 31, 1982, and may not in any case be later than December 31, 1987, 42 U.S.C. § 7502. In addition, each SIP applicable to a "nonattainment area"—an area where EPA has determined that an air pollutant exceeds the NAAQS for that pollutant—must require such reductions in emissions from existing sources of the pollutant in the area as may be achieved through the adoption of, at a minimum, reasonably available control technology. 42 U.S.C. § 7502(b)(2).

11. The entire state of Massachusetts is a nonattainment area for the primary ozone NAAQS. *See* 40 C.F.R. § 81.322. VOCs are an "air pollutant," as defined in Section 302(g) of the Act, 42 U.S.C. § 7602(g), that contributes to ozone formation.

12. Massachusetts, through its DEQE, has promulgated regulations codified at 310 CMR 7.18(7) which limit VOC emissions from automobile surface coating lines. In the form approved by EPA on September 16, 1980, *see* 45 Fed. Reg. 61293, 61295 (copy attached as Exhibit 1), and as amended effective November 9, 1983, *see* 48 Fed. Reg. 51480, 51482 (copy attached as Exhibit 2), these regulations (hereinafter the "automobile coating SIP provisions") are incorporated in the Massachusetts SIP.

13. The Massachusetts automobile coating SIP provisions provide in part:

> (7) *U Automobile Surface Coating.* No person owning, leasing, or controlling the operation of any automobile assembly plant shall cause, allow, or permit emissions therefrom in excess of those emission limitations set forth in the following table and within the time schedules specified in the following table.

Table 5
Emission Limitations
Automobile Surface Coating

U Volatile Organic Compounds

Emission Source	Emission Limitations Lbs. of volatile organic compounds per gallon of coating (excluding water) at application	Compliance Date Achieve Full Compliance with emission limitation
Topcoat application, flash off area, and oven	5.8*	By December 31, 1979
	5.0*	By December 31, 1982
	and 2.8*	By December 31, 1985
Final repair application, flash off area, and oven	4.8*	By December 31, 1985

* *Note*: Compliance with these emission limitations shall be based upon an arithmetic average of topcoat coatings and final repair coatings.

14. The Massachusetts automobile coating SIP provisions, as federally approved, applied at all times relevant to this Complaint to the lacquer coating lines at General Motors' Framingham plant.

CLAIM FOR RELIEF

15. From January 1, 1986 until operation of the lacquer coating lines was terminated in about July 1987, VOC emissions from topcoatings and final repair coatings on those coating lines exceeded the emission limits in the automobile coating SIP provisions during virtually every day the lines were in operation. There was no pollution control equipment operating on these lines to control VOC emissions at any relevant time.

16. Under Section 113(a) of the Act, 42 U.S.C. § 7413(a)(1), if the Administrator of EPA finds a person to be in violation of an applicable SIP, the Administrator shall notify the person and the state in which the SIP

applies. If the violation extends beyond the thirtieth day after the date of the Administrator's notification, the Administrator may bring a civil action under Section 113(b)(2) of the Act for injunctive relief, civil penalties of up to $25,000 per day of violation, or both.

17. On August 14, 1986, EPA issued General Motors a Notice of Violation under Section 113(a) of the Act, 42 U.S.C. § 7413(a), citing violations of the Massachusetts automobile coating SIP provisions on the topcoat and final repair coating lines at the Framingham plant. EPA sent a copy of the Notice of Violation to the Massachusetts DEQE pursuant to Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1).

18. General Motors received the Notice of Violation on August 18, 1986.

19. After September 17, 1986, VOC emissions from topcoatings and final repair coatings used on the lacquer coating lines at the Framingham plant continued to exceed the emission limits set forth in the Massachusetts automobile coating SIP provisions.

20. General Motors has, therefore, violated the Massachusetts automobile coating SIP provisions and Section 113 of the Act, 42 U.S.C. § 7413.

WHEREFORE, Plaintiff, United States of America, respectfully prays that this Court enter judgment against Defendant for:

(a) Civil penalties of up to $25,000 for each day on which Defendant has operated the lacquer coating lines at the Framingham Plant in violation of the Massachusetts automobile coating SIP provisions or the Act;

(b) Plaintiff's costs of this action; and

(c) Such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

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D. *United States* v. *General Motors Corp.*, No. 87-2068-Mc (D. Mass. May 16, 1988)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 87-2068-Mc

UNITED STATES OF AMERICA,
Plaintiff,

v.

GENERAL MOTORS CORPORATION,
Defendant.

MEMORANDUM AND ORDER

May 16, 1988

Mc NAUGHT, D. J.

This action comes on to be heard on defendant General Motors' ("GM") motion to dismiss or, in the alternative, for summary judgment. Since affidavits and other documents outside the pleadings have been presented, we treat the matter as a motion for summary judgment. The issue before us is the Environmental Protection Agency's ("EPA") enforcement authority under the Clean Air Act (the "Act"), 42 U.S.C. § 7401 *et seq.*

The Clean Air Act provides for the EPA to establish National Ambient Air Quality Standards ("NAAQSs") which States must meet by specified deadlines. 42 U.S.C. § 7409. The states, in turn, are responsible for devising State Implementation Plans ("SIP") which regulate the specific details of how implementation is to be achieved. These SIPs must be submitted by the state to the EPA for approval. 42 U.S.C. § 7410. Then, by the terms of section 7410(a)(2):

> "The Administrator shall, within four months after the date required for submission of [the SIP], approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan . . . if he determines that it was adopted after reasonable notice and hearing and that [certain other criteria are met]."

Once the SIP has been approved by the EPA, it is enforceable under both State and federal law.

The original SIP is not necessarily the final word, however. Under 42 U.S.C. § 7410(a)(3)(A), the state may submit revised SIPs to the EPA for approval.

> "The Administrator shall approve revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and hearing."

The heart of the issue before us is whether this provision requires the EPA to approve or disapprove proposed SIP revisions within four months as is the case for original SIPs.

The facts before us are as follows: In February, 1979 the EPA promulgated NAAQSs having to do with photochemical oxidants, including ozone. One of the industries affected by these NAAQSs was the GM Plant in Framingham, whose painting facilities emitted volatile organic compounds ("VOCs") which react with the atmosphere to create ozone.

Later that year, the Massachusetts Department of Environmental Quality Engineering ("DEQE") submitted a proposed SIP which included provisions regulating VOC emissions from automobile surface coating operations. 310 CMR 7.18(7). GM's Framingham plant is the only such facility in the Commonwealth. EPA approved this regulation in 1980. 45 Fed. Reg. 61293, 61295. This SIP required GM to meet

compliance regulations in stages, with full compliance by December 31, 1985, some two years earlier than the maximum time allowed by the NAAQS.

In October 1981, the EPA published a policy statement which acknowledged a shift in automobile painting technology from the older lacquer-based process to a new basecoat/clear coat ("BC/CC") process, which would eliminate many prior pollution problems. 46 Fed. Reg. 51366. This statement provided that the EPA would allow revisions of SIPs which gave automakers until 1986 or, in some cases, 1987 to shift to the BC/CC process. *Id.* at 51367.

In November 1984, GM submitted a proposed compliance schedule to DEQE. This schedule related to the lacquer operations which were still in use at Framingham, and asked for an extension of time, beyond the end of 1985, to install the necessary emission controls. By June, 1985, however, GM had indicated its plans to convert the Framingham plant to the BC/CC process. This conversion was expected to take until the end of 1987. On December 30, 1985, the day before the final compliance deadline under the original SIP, DEQE proposed a revised SIP which would give GM until August 31, 1987 to comply with the NAAQS.

To make an already long story shorter, GM began construction of a new $200 million BC/CC facility while continuing its out-of-compliance (under the original SIP) lacquer operations. For its part, EPA Region I conducted negotiations with GM and DEQE on the matter, but with no satisfactory resolution. According to the affidavit of John L. Hamisch, the Chief of the State Air Programs Branch of EPA Region I, on May 30, 1986 Region I was prepared to send a proposed disapproval of the revised SIP to EPA Headquarters, but delayed this action at DEQE's request. The proposed disapproval did go to EPA Headquarters on July 2, 1986. Final decision on the matter has yet to take place as the paperwork has floated about the EPA.

Notwithstanding this, in August 1986 the EPA issued a "Notice of Violation" to GM based on the requirements of the original SIP, and on August 17, 1987, the United States brought this action. GM's new BC/CC plant was completed in July 1987, the lacquer plant closed permanently, and since that time GM has been in compliance with all applicable NAAQSs.

The issue before us—whether or not the provisions of section 7410(a)(3)(A) incorporate the four month deadline of section 7410(a)(2)—is an open question in this Circuit. As conceded by the government, however, the weight of authority is that it does. The most recent case to address the subject is *United States v. Alcan Foil Products, et al.*, (C.A. No. 87-0434 L (CS), W.D. Ky., March 15, 1988).

Alcan also involved SIPs and proposed SIP revisions dealing with VOC emissions, in that case from rotogravure printing presses. The facts are quite similar to those before us. The EPA approved the pertinent original SIP in 1981. In 1984 the EPA approved an initial revision of the SIP. In March of 1986, however, a second revision was proposed. Just over four months later, without taking action on the proposed SIP revisions, EPA served Alcan with a noncompliance notice. A year and one day later, having notified Alcan of perceived obstacles to approval of the proposed SIP, but not yet having acted upon it, EPA filed suit. As of the date of the *Alcan* decision, more than two years from the time Kentucky had proposed its revised SIP, the EPA had not yet acted.

The *Alcan* court relied heavily on the other principal case in this area, *American Cyanamid Co. v. EPA*, 810 F.2d 493 (5th Cir. 1987). As in *Cyanamid*, the court held that although the EPA had the authority to reject the proposed SIP and to enforce the old standard from that point on, it could take no enforcement action until then. *Alcan* at 4.

Any other result makes little sense from a practical standpoint. The very structure of the Clean Air Act describes a

cooperative venture in which federal authorities prescribe long-term national standards but allow each state, within limits, to determine the best way to reach them. *Cyanamid* at 500. Indeed, the language of section 7410(a)(3)(A) is such that

> "[t]he Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met . . . [S]o long as the ultimate effect of a State's choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission standards it deems best suited to its particular situation."

Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 79 (1975).

Were we to accept the government's interpretation of section 7410(a)(3)(A) the role of the states in this cooperative venture would be severely curtailed. Clearly, one of the reasons the states were authorized to propose revisions to SIPs is that they are closer to the problems and, therefore, better able to determine the best interests of their citizens and state industries in achieving the mandatory federal standards. A system which would allow EPA to proceed indefinitely without accepting or rejecting the state's plan, while at the same time enforcing the previous law, would put all the cards in federal hands. This is clearly contrary to the intent of the statute.

The United States makes much of the idea that proposed SIP revisions are different from original SIP proposals. This is so in part, they argue, because the groundwork for many original SIPs was already in place and because there was a

need, initially, to get up to speed in Clean Air Act enforcement. In addition, SIP approval was necessary before any of EPA's other activities could begin, whereas proposed SIP revisions must compete with other EPA priorities. Consequently, the government insists, "EPA [should be] entitled to a reasonable time for action on proposed SIP revisions submitted by the statutes, not constrained by the four-month period for decisions on original SIPs." (Plaintiff's Brief at 21).

We agree that the EPA should have a "reasonable" time to review and act upon proposed SIP revisions. As it is, we believe that the four month period which the *Alcan* and *Cyanamid* courts have agreed upon meets this standard. *Accord Duquesne Light Co. v. EPA*, 698 F.2d 456 (D.C. Cir. 1983); *Council of Commuter Organizations v. Thomas*, 799 F.2d 879 (2d Cir. 1986); *Council of Commuter Organizations v. Gorruch*, 683 F.2d 648 (2d Cir. 1982). *Contra United States v. National Steel Corp.*, 767 F.2d 1176 (6th Cir. 1985). This is so for a number of reasons.

First, the EPA always holds the ultimate trump card: it may at any time during or after the allowed four month period reject the proposal and invoke enforcement proceedings under the original SIP. Second, it strains credulity that truly important or controversial SIP revisions cannot be effectively identified early on in the process and scheduled for expedited review. This is especially so since SIP revisions will seldom be breaking "new ground," but will merely modify already approved procedures. Third, a period any greater than four months would leave both the states and the affected industries in an unjustifiable state of limbo. For an indefinite period, the state would be unable to act to balance dictated national priorities with the interests of its citizens and industries as the Clean Air Act intended. And the industries themselves, though fully in compliance with state law, would in some instances face the Scylla and Charybdis choice between ceasing operations now, or possibly being forced out of business by heavy fines later. Although it is not likely

that such fines in Framingham would force GM to bankruptcy, that would be cold comfort to Framingham workers who might be laid off while a new plant was being built or because the plant was moved out of state.

The provisions of 42 U.S.C. § 7410(a)(3)(A) do not call for that choice. We agree with the *Alcan* and *Cyanamid* courts and others that the statute parallels the provisions of section 7410(a)(2) in providing EPA with four months to render a decision on proposed SIP revisions. If a decision is delayed beyond that time, the EPA is prohibited from bringing or continuing enforcement proceedings under the original SIP until final action is taken.

The proposed SIP revision in issue here went to EPA nearly two and one-half years ago, and final action has yet to be taken. In the meantime, GM has built a brand new $200 million facility, shut down permanently the offending lacquer plant, and come into full compliance with the ozone NAAQSs. For EPA to complain at this point that it was not given "reasonable" time to act smacks of closing the barn door after the horse is already out. If the EPA is to achieve its stated objective in the future, it will have to get the door closed faster.

For all of the above reasons, defendant's motion for summary judgment is GRANTED.

SO ORDERED.

JOHN J. McNAUGHT
UNITED STATES DISTRICT JUDGE

No. 89-369

(6)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The First Circuit

BRIEF OF PETITIONER GENERAL MOTORS CORPORATION

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QUESTIONS PRESENTED

In 1985 the Commonwealth of Massachusetts revised its Clean Air Act implementation plan to provide an extension of time to 1987 for General Motors to comply with certain air regulations. The revision was adopted pursuant to the Clean Air Act and published EPA policy. The extension of time allowed GM time to build a new $200 million facility that achieved lower emissions than were otherwise required. EPA failed to approve or disapprove the Commonwealth's revision, and instead filed suit against GM seeking penalties for failure to meet the original deadline. The questions presented are:[1]

1. Where EPA has failed to act on a revision to a state plan within four months, as required by the Clean Air Act, may the government bring an action for civil penalties against a company that is in compliance with the revised plan?

2. Whether the decision below undermines the primary role of the states under the Act and interferes with the ability of states to make ongoing policy choices as to air pollution control measures?

3. Whether the decision below will create disincentives for even-handed administration of the Act and will unnecessarily enmesh the courts in litigation concerning the reasonableness of EPA's delay in approving state plans?

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[1] The names of all parties are set forth in the caption of this case. The appendix to the petition for certiorari (pp. 19a-21a) lists all parent companies, subsidiaries and affiliates as required by Rule 29.1. (DHMS Industries, Ltd. (Korea), listed at page 20a of that appendix, no longer exists.)

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Statutory Background	3
B. The Massachusetts SIP	4
C. Proceedings Below	7
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. THE REQUIREMENT THAT EPA ACT UPON SIP REVISIONS WITHIN FOUR MONTHS IS AN INTEGRAL PART OF THE STATUTORY SCHEME DESIGNED TO PRESERVE THE PRIMARY ROLE OF THE STATES	12
A. The Statute Requires EPA To Act Upon SIP Revisions Within Four Months	13
B. The Four-Month Rule Serves As An Important Check On EPA Efforts To Run State Programs And Acts To Preserve The Primary Role Of The States	15
C. EPA's "Pocket Veto" Of A SIP Revision Frustrates The Statutory Scheme	17

II. EPA'S FAILURE TO TAKE PROMPT ACTION UPON A SIP REVISION BARS AGENCY ENFORCEMENT OF INCONSISTENT PROVISIONS OF THE PRE-EXISTING SIP	20
A. Federal Enforcement Of SIP Requirements That A State Has Sought To Change Is Inconsistent With The Primary Role Of The States Envisioned In The Statute	20
B. The Remedy Fashioned By The Fifth Circuit In *American Cyanamid* Is An Appropriate, Non-Intrusive Response To EPA's Failure To Comply With A Mandatory Statutory Requirement	24
C. The Fifth Circuit's Approach Properly Implements Congress's View of the "Reasonable" Time for EPA Review	27
III. ALTERNATIVE REMEDIES SUGGESTED BY EPA AND BY THE COURT BELOW ARE INADEQUATE, INTRUSIVE, AND CUMBERSOME	31
A. Alternative Remedies Are Insufficient to Give Full Effect To The Primary Role Of The States Under The Act	31
B. EPA's Failure To Take Prompt Action On SIP Revisions Subjects Industry To Conflicting Federal And State Regulatory Requirements And Provides A Serious Disincentive To The Adoption Of Innovative Pollution Control Strategies	34
C. A Bar On Enforcement Actions That Are Inconsistent With Pending SIP Revisions Upon Which EPA Has Failed To Act Within Four Months Is Necessary To Preserve The Integrity of EPA's SIP Review Process	37

D. The *American Cyanamid* Remedy, Unlike Other Proposed Remedies, Does Not Require Extensive And Continuing Judicial Involvement In EPA's Allocation Of Agency Resources 40

CONCLUSION 45

Appendix: Statutory Provisions Involved

TABLE OF AUTHORITIES

Page

CASES

Alabama Power Co. v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979) 44

American Cyanamid Co. v. *EPA*, 810 F.2d 943 (5th Cir. 1987) ..... 20-22, *passim*

Bethlehem Steel Corp. v. *EPA*, 782 F.2d 645 (7th Cir. 1986) 18

Bethlehem Steel Corp. v. *Gorsuch*, 742 F.2d 1028 (7th Cir. 1984) 10,17,19,20

Brock v. *Pierce County*, 476 U.S. 253 (1986) 26

Chevron, U.S.A., Inc. v. *Natural Resources Defense Council*, 467 U.S. 837 (1984) 21

Concerned Citizens of Bridesburg v. *EPA*, 836 F.2d 777 (3d Cir. 1987) 17

Council of Commuter Organizations v. *Gorsuch*, 683 F.2d 648 (2d Cir. 1982) 14

Council of Commuter Organizations v. *Thomas*, 799 F.2d 879 (2d Cir. 1986) 14

Duquesne Light Co. v. *EPA*, 698 F.2d 456 (D.C. Cir. 1983) 14,32

Florida Power & Light Co. v. *Costle*, 650 F.2d 579 (5th Cir. 1981) 17

General Motors Corp. v. *EPA*, 871 F.2d 495 (5th Cir. 1989) 22,35,37,39

Indiana & Michigan Electric Co. v. *EPA*, 733 F.2d 489 (7th Cir. 1984) 18,19

Mision Industrial, Inc. v. *EPA*, 547 F.2d 123 (1st Cir. 1976) 17

Natural Resources Defense Council v. *Thomas*, 705 F. Supp. 1 (D.D.C. 1988) 41,43,44

NRDC v. *Train*, 510 F.2d 692 (D.C. Cir. 1974) ... 44

Table of Authorities Continued

	Page
Sierra Club v. *EPA*, 719 F.2d 436 (D.C. Cir. 1983), *cert. denied*, 468 U.S. 1204 (1984)	14
Sierra Club v. *Gorsuch*, 551 F. Supp. 785 (N.D. Cal. 1982)	44
Sierra Club v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (7th Cir. 1983)	17,35
Sierra Club v. *Ruckelshaus*, 602 F. Supp. 892 (N.D. Cal. 1984)	43
State of Michigan v. *Thomas*, 805 F.2d 176 (6th Cir. 1986)	19
Train v. *Natural Resources Defense Council*, 421 U.S. 60 (1975)	4,14,15,16,17,18,26,42
Union Electric Co. v. *EPA*, 427 U.S. 246 (1976)	16,17,19,34,42
United States v. *Alcan Foil Products*, 889 F.2d 1513 (6th Cir. 1989)	14,20,28,42
United States v. *General Motors*, 876 F.2d 1060 (1st Cir. 1989)	9-10, *passim*
United States v. *National Steel Corp.*, 767 F.2d 1176 (6th Cir. 1985)	14

STATUTES

28 U.S.C. § 1254(1) (1982)	1
42 U.S.C. § 7401	16
42 U.S.C. § 7407 (1982)	2,3
42 U.S.C. § 7409 (1982)	3
42 U.S.C. § 7410 (1982)	*passim*
42 U.S.C. § 7410(a)(2)	13-14, *passim*
42 U.S.C. § 7410(a)(3)	13-14, *passim*
42 U.S.C. § 7410(c)	18
42 U.S.C. § 7410(g)	13,27,28
42 U.S.C. § 7411(j)	6
42 U.S.C. § 7413(a)(1)	4

Table of Authorities Continued

	Page
42 U.S.C. § 7502(a)(2) (1982)	4
42 U.S.C. § 7603(a) (1982)	25
42 U.S.C. § 7604(a)(2) (1982)	10,41,42,43
42 U.S.C. § 7607(b)(1) (1982)	41

LEGISLATIVE MATERIALS

U.S. Senate Committee on Public Works, *A Legislative History of the Clean Air Act Amendments of 1970*	15,16
H.R. Rep. No. 95-294, 95th Cong., 1st Sess. (1977)	16
S. Rep. No. 95-127, 95th Cong., 1st Sess. (1977)	16

MISCELLANEOUS

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310 CMR 7.18(7)	5,6,24
EPA, *Report of Audit: Review of EPA's Process for Approving/Disapproving State Implementation Plans and Revisions*, E1K6*8-11-0045-9100210 (March 1989) (copy lodged with the Clerk of the Court)	25,29,30
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46 Fed. Reg. 51386 (1981)	5,6
50 Fed. Reg. 18693 (1985)	6
50 Fed. Reg. 20602 (1985)	7
51 Fed. Reg. 3476 (1986)	7
51 Fed. Reg. 43394 (1986)	7,38
53 Fed. Reg. 36011 (1988)	9
54 Fed. Reg. 19173 (1989)	33
Sup. Ct. Rule 24	12

IN THE

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OCTOBER TERM, 1989

No. 89-369

GENERAL MOTORS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The First Circuit

BRIEF OF PETITIONER GENERAL MOTORS CORPORATION

OPINIONS BELOW

The opinion of the Court of Appeals was rendered on June 7, 1989. It is reported at 876 F.2d 1060 and is reprinted in the Appendix to the Petition for Certiorari.

The opinion of the District Court, which was rendered on May 16, 1988, is unpublished and appears at pp. 119-25 of the Joint Appendix.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1982). The petition for certiorari was timely filed

on September 5, 1989, and the Court granted the petition on December 4, 1989.

STATUTORY PROVISIONS INVOLVED

The Clean Air Act provides that the states are to be accorded primary responsibility for assuring air quality within their boundaries. 42 U.S.C. § 7407(a) (1982). This responsibility is fulfilled primarily through the promulgation of Implementation Plans by the States, with general oversight by the federal Environmental Protection Agency ("EPA"). 42 U.S.C. § 7410 (1982). The statute requires EPA to act to approve or disapprove State Implementation Plans ("SIPs") and revisions to SIPs within four months. 42 U.S.C. § 7410(a)(2), (3) (1982). The pertinent provisions of the statute are reprinted in Appendix A to this brief.

STATEMENT OF THE CASE

This case concerns the appropriate division of authority between the federal government and the states in the establishment of State Implementation Plans under the Clean Air Act. Relying on an EPA policy published in 1981, the Commonwealth of Massachusetts revised its SIP regulations to grant General Motors a 20-month extension of time to comply with certain air emission limits. The purpose of the SIP revision was to allow General Motors time to construct a new automobile painting facility using a more advanced, lower-emitting painting system than the facility it replaced. EPA failed to approve or disapprove the SIP revision. The new facility was constructed and the extension expired. EPA then filed suit in August 1987 seeking penalties to enforce the 1985 deadline in the original SIP.

Under the Clean Air Act, the states have primary responsibility for developing plans to implement the Act. The statute grants EPA limited authority to approve or disapprove such plans or revised plans within four months.

Citing the Fifth Circuit's decision in *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (5th Cir. 1987), General Motors argued that EPA's failure to meet the four-month deadline in this case barred any enforcement action against General Motors unless and until EPA completes its review and in fact disapproves the revision. The district court agreed and entered summary judgment for General Motors. The United States Court of Appeals for the First Circuit reversed, expressly declining to follow the rule established in *American Cyanamid*.

A. Statutory Background

The Clean Air Act of 1970 established a federal-state partnership for the control of air pollution. The statute creates a logical and straightforward division of authority. The federal government, through the EPA, establishes the national air quality goals for various pollutants, such as ozone, called National Ambient Air Quality Standards ("NAAQS"). 42 U.S.C. § 7409. However, when it comes to determining the source-specific emission limits to achieve the national standards, each state has "the primary responsibility for assuring air quality" within its borders. 42 U.S.C. § 7407(a). Under the Act, each state is required, after notice and public hearings, to adopt a State Implementation Plan ("SIP") consisting of regulations providing for the attainment, implementation, and enforcement of the national standards for sources within the state. 42 U.S.C. § 7410.

Each state must submit its SIP to EPA for review and approval. 42 U.S.C. § 7410(a)(1). However, Congress believed it important that the states retain wide latitude in determining how national standards should be achieved, given local needs and conditions. Accordingly, EPA was prohibited from rejecting a state SIP if it was designed to achieve and maintain the national standards. 42 U.S.C. § 7410(a)(2). This Court has emphasized that "the State is at liberty to adopt whatever mix of emission limitations

it deems best suited to its particular situation" as long as the net result is compliance with the national standards. *Train* v. *Natural Resources Defense Counsel*, 421 U.S. 60, 79 (1975).

The Act contains various deadlines, including those for EPA action on SIPs.[1] Under 42 U.S.C. § 7410(a)(2), EPA is required to approve or disapprove a SIP within four months of its submission. This requirement for prompt review by EPA serves to ensure rapid implementation of the state programs, and to minimize the time during which there may be differences between state and federal air programs. A federally approved SIP is enforceable by both the state and the federal government.[2]

The statute allows a state to revise its SIP at any time it deems appropriate. 42 U.S.C. § 7410(a)(3). Congress anticipated that the design and administration of SIPs would be an ongoing process to take into account new air quality data, technological and economic considerations, and evolving policies. EPA's review of a SIP revision is governed by the same substantive and procedural requirements applicable to original SIPs, including the duty to act on SIP revisions within four months. *Id.* As noted above, the four-month deadline requires EPA to render a prompt decision, so that the state may, if necessary, make appropriate adjustments in its plan and proceed to administer and enforce it with minimal disruption and confusion.

B. The Massachusetts SIP

General Motors owns and operates an automobile assembly plant in Framingham, Massachusetts. The plant

[1] The Act contains deadlines for states to promulgate certain aspects of their plans. 42 U.S.C. § 7410(a)(1). The Act also contains deadlines for the attainment of air quality standards. For ozone the deadline is December 31, 1987. 42 U.S.C. § 7502(a)(2).

[2] The state can enforce it as a part of its legislative and regulatory process. EPA's enforcement authority derives from the Clean Air Act, which authorizes federal enforcement in cases where an applicable EPA-approved SIP is violated. 42 U.S.C § 7413(a)(1).

contains a paint shop that is a source of volatile organic compounds ("VOCs"), which contribute to ozone. In 1979, the Commonwealth of Massachusetts promulgated SIP regulations establishing limits on emissions of VOCs. 310 CMR 7.18(7), J.A. 27. These regulations applied to automobile painting operations at GM's Framingham plant, the only automobile plant in the Commonwealth. As originally promulgated, the regulations required full compliance with the emission limits by December 31, 1985—two years before the Clean Air Act's final 1987 compliance deadline for ozone. 42 U.S.C. § 7502(a)(2). These SIP regulations were approved by EPA in 1980.

On October 2, 1981, shortly after the Massachusetts SIP requirements were approved, EPA published a policy statement advocating delay of the compliance dates for automobile painting operations up to the 1987 statutory deadline. 46 Fed. Reg. 51386 (1981), J.A. 30. Deferral of deadlines in existing SIPs was suggested by EPA as part of its effort to "reduce the regulatory burden on the motor vehicle industry." *Id.* The policy noted that deadline deferrals would allow the industry time to develop and implement more cost-effective technology, including new painting methods and control technology, and would allow a more orderly compliance effort nationally. *Id.* EPA stated that it "will approve" state SIP revisions submitted, consistent with the policy, which postpone final compliance with the automobile painting limits up until 1987. *Id.*, J.A. 33-34. In order to allow the industry to concentrate on the development of cost-effective final control techniques, EPA recommended that states not impose interim emission limits, but simply grant an extension of time to meet final limits. *Id.* at 51387, J.A. 35.

Pursuant to this policy statement, General Motors in 1984 submitted a request to the Commonwealth of Massachusetts for extension of the deadline in 310 CMR 7.18(7) to December 31, 1987, for the automobile coating operations at the Framingham plant. This request was based

on the proposed installation of abatement controls at General Motors' then-existing lacquer painting facilities at the plant. J.A. 38.[3] In mid-1985, General Motors revised its request to reflect a decision to adopt a more substantial long-term air pollution control strategy at the Framingham facility. General Motors decided to close the lacquer facility and build, at a cost of over $200 million, a technologically innovative basecoat/clearcoat enamel paint system.[4] This new system, although much more costly to install, had the advantages of lowering emissions *substantially below* the level required by 310 CMR 7.18(7), and of improving the efficiency and competitiveness of the Framingham plant. On June 7, 1985, General Motors informed the Commonwealth of its revised plans and reiterated its request for an extension of the SIP compliance deadline. J.A. 41.

The Commonwealth provided public notice and held a hearing on the proposed SIP revision, which was attended by EPA representatives. J.A. 61. Following the public hearing, the Commonwealth revised its SIP to extend the automobile compliance deadline for 20 months to August 31, 1987, several months short of the final Clean Air Act deadline and GM's requested extension. The revised SIP was submitted by the Commonwealth to EPA for approval on December 30, 1985. J.A. 50. There was good reason to believe that the Commonwealth's SIP revision was approvable, based on EPA's 1981 policy and Agency actions to implement that policy.[5]

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[3] The cost of this conventional control option was estimated by GM to be under $20 million.

[4] This basecoat/clearcoat system was cited with approval in EPA's 1981 policy. 46 Fed. Reg. 51386 (1981), J.A. 30. EPA orders issued to several automobile companies under § 111(j) of the Act, 42 U.S.C. § 7411(j), also recognized this system as innovative technology. *See* 40 C.F.R. § 60.398.

[5] Earlier that year, EPA proposed to approve a request for a similar extension of the compliance deadline for a GM plant in Delaware, 50 Fed. Reg. 18693 (1985), and EPA approved a similar deferral for a Ford plant in Virginia. 50 Fed. Reg. 20602 (1985). In the following year, EPA reaffirmed the continuing effectiveness of the 1981 policy. 51 Fed. Reg. 3476 (1986).

During the ensuing two years and nine months, EPA took no final action to approve or disapprove the proposed revision.[6] In reliance on the SIP revision and EPA's policy of deferral, General Motors proceeded with its state-approved compliance strategy and spent over $200 million to construct a new, lower-emitting paint facility using the basecoat/clearcoat technology. The old Framingham paint facility was closed on schedule,[7] and there is no dispute that General Motors was—and remains—in full compliance with the revised SIP requirements.

C. Proceedings Below

The Complaint in this action was filed on August 17, 1987, nearly twenty months after the proposed SIP revision was submitted to EPA, and more than a month after the old Framingham paint facility was permanently

[6] On December 2, 1986, more than seven months after the statutory deadline for final decision on the Massachusetts revision, EPA issued a Notice of Proposed Rulemaking, stating that it was *considering* disapproval of the revision. 51 Fed. Reg. 43394 (1986). EPA stated that it was considering disapproving the revision, *inter alia*, because "[e]xtensions of the December 31, 1985 date should instead be obtained through an *enforcement* mechanism." *Id.* at 43395 (emphasis added). This suggested ground for disapproval ignored the fact that the entire purpose of the revision was to defer the deadline, which would render inappropriate any "enforcement" of the pre-existing deadline. The Commonwealth of Massachusetts and General Motors both filed comments in opposition to the proposed disapproval. Eight more months then passed before EPA brought this suit—still without taking final action on the revision.

[7] In fact, General Motors closed the old lacquer paint facility on July 7, 1987, more than a month before the Commonwealth's revised deadline. J.A. 23.

shut down.[8] The Complaint sought civil penalties for violation of the 1985 deadline in the original SIP. The complaint also requested injunctive relief.[9] The Complaint made no mention of the Commonwealth's revision of that SIP deadline; nor did it mention that, despite the passage of nearly two years, EPA had still not taken final action on that revision.

On September 18, 1987, General Motors moved for summary judgment. J.A. 14. Relying principally upon the Fifth Circuit's holding in *American Cyanamid Co.* v. *United States*, *supra*, General Motors asserted that EPA's failure to act upon the proposed SIP revision within the four-month statutory period barred it from bringing an enforcement action inconsistent with that revision. On May 16, 1988, the District Court granted summary judgment to General Motors. The District Court found that conditioning enforcement upon EPA's compliance with the four-month deadline was appropriate on several grounds, including the fact that EPA had not taken final action:

> "First, the EPA always holds the ultimate trump card: it may at any time during or after the allowed four month period reject the proposal and invoke enforcement proceedings under the original SIP. Second, it strains credulity that truly important or controversial SIP revisions cannot be effectively identified early on in the process and scheduled for expedited review. . . . Third, a period any greater than four months would

[8] On August 14, 1986, prior to taking action on the proposed SIP revision, EPA issued a Notice of Violation (a statutory prerequisite to the initiation of an enforcement action) for violation of the original 1985 deadline.

[9] EPA later withdrew its request for injunctive relief and does not dispute that the painting facility at issue has been permanently closed. *See* First Amended Complaint, J.A. 112. Accordingly, the relief that EPA currently seeks in this case is past penalties for alleged violations of the old SIP requirements for the period before the facility was closed.

> leave both the states and the affected industries in an unjustifiable state of limbo. For an indefinite period, the state would be unable to act to balance dictated national priorities with the interests of its citizens and industries as the Clean Air Act intended. And the industries themselves, though fully in compliance with state law, would in some instances face the Scylla and Charybdis choice between ceasing operations now, or possibly being forced out of business by heavy fines later."

Slip op. at 7, J.A. 124.

EPA appealed the district court's decision. On September 16, 1988, the very day that EPA filed its brief in the Court of Appeals, it published a final notice disapproving the SIP revision. 53 Fed. Reg. 36011 (1988). At that point, of course, the SIP revision had become moot for all practical purposes except EPA's enforcement action.[10] On June 7, 1989, the First Circuit reversed the district court's decision and remanded for further proceedings.

The First Circuit agreed with the district court that the Clean Air Act imposes a four-month deadline on EPA review of SIP revisions. 876 F.2d at 1066. The court noted that it is unlikely that Congress "intended for the states' legitimate policy choices to be held hostage to EPA's schedule," and that the *American Cyanamid* rule provides EPA with the greatest incentive to complete its review within four months. *Id.* at 1066-1067. The First Circuit nonetheless held that that EPA may bring an enforcement

[10] General Motors has filed a request for reconsideration with EPA, pointing out technical and legal deficiencies and irregularities in the disapproval decision. General Motors also filed a petition for review of the decision in the Court of Appeals. General Motors v. United States, No. 88-2123 (1st Cir). That appeal has been stayed by the First Circuit pending EPA action on the request for reconsideration—and, of course, the final decision in this case, either of which, if decided in General Motors' favor, would render the appeal moot.

action. It concluded, without citing any factual support, that EPA would frequently miss the deadline even with the incentive of an enforcement bar, and held that an enforcement bar was "too drastic." *Id.* at 1067.[11]

The First Circuit suggested a different, "two-fold" remedy for EPA's failure to observe the four-month deadline. First, the affected source may file suit in federal district court under 42 U.S.C. § 7604(a)(2) to compel EPA to act on the SIP revision. *Id.* Second, when EPA brings an enforcement action, the district court may consider, in assessing penalties, the reasonableness of the Agency's delay and the resulting prejudice, if any, suffered by the company. *Id.* at 1068. The Court expressed the hope that these remedies would "induce prompt EPA action and thus ensure that the interests of the states need not yield too far." *Id.* For the reasons set forth below, the First Circuit's approach is inconsistent with the primary role of the states in establishing SIPs under the Act, will not sufficiently induce EPA to meet the four-month deadline, and is more intrusive on EPA and the courts than the enforcement bar adopted in *American Cyanamid*.

SUMMARY OF ARGUMENT

In enacting the Clean Air Act, Congress created an "experiment in federalism" that was designed to achieve national standards through state regulation. *Bethlehem Steel Corp.* v. *Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984). Under the Act, EPA's role is significant but limited. The Agency promulgates the national standards and supervises state achievement of those standards, but the development and enforcement of specific emission limitations to achieve those standards is left primarily to the discretion of the states.

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[11] The First Circuit indicated that it would be receptive to the *American Cyanamid* remedy if it were certain that EPA could review SIP revisions within four months. 876 F.2d at 1067.

The statute contains a series of very specific substantive and procedural requirements that are designed to create and maintain the proper balance of state and federal authority in the "partnership" between EPA and the states. Among these requirements is a requirement that revisions to SIPs promulgated by the states be acted on by EPA within four months. EPA has regularly, as a matter of policy as well as practice, failed to comply with this requirement.[12] Instead, the Agency has claimed the right to ignore state-promulgated SIP revisions for extended periods of time and to proceed with enforcement actions against companies who have acted in good-faith compliance with the revised SIP.

This policy and practice on the part of EPA seriously upsets the careful balance of state and federal authority created under the Act. The rule adopted by the Fifth Circuit in *American Cyanamid Co.* v. *EPA* is a reasonable, limited, and relatively nonintrusive remedy for EPA's failure to act promptly on SIP revisions. The Fifth Circuit's approach gives EPA a choice between completing its review of a SIP revision within four months, as the statute requires, or foregoing, during the pendency of EPA delay, any enforcement action that would be inconsistent with that revision. This is the only remedy that maintains the balance of authority between the states and the federal government as intended by Congress.

Alternative remedies, including those suggested by the First Circuit in this case and by the government, are not effective to redress the imbalance of state and federal authority that EPA creates by not acting promptly upon SIP revisions. Since these remedies leave EPA free to ignore pending SIP revisions in pursuing its enforcement strategy, they create little incentive for the Agency to act on revisions promptly. The alternative remedies also fail

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[12] See pages 28-31 below.

to take into account the extent to which EPA's insistence on enforcement, where it has failed to act on a pending SIP revision, threatens to undermine the integrity of the SIP review process itself by commingling EPA's enforcement and SIP review functions. Moreover, these remedies would inevitably involve the courts in a constant stream of burdensome and unnecessary litigation over the management of EPA's SIP review program and the "reasonableness" of the delays experienced in particular cases.

ARGUMENT

I. THE REQUIREMENT THAT EPA ACT UPON SIP REVISIONS WITHIN FOUR MONTHS IS AN INTEGRAL PART OF THE STATUTORY SCHEME DESIGNED TO PRESERVE THE PRIMARY ROLE OF THE STATES.

The First Circuit held that EPA must act on SIP revisions within four months, and properly rejected the government's position that EPA may act on SIP revisions at its sole convenience.[13] However, the First Circuit failed to relate the four-month rule to EPA's secondary role in the SIP process and erroneously assumed that the deadline is unrealistic. Review of the statutory and policy basis for the four-month rule is important to an understanding of the reasons why the remedy fashioned by the First Circuit is insufficient, and why a temporary bar on enforcement is necessary.

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[13] In its opposition to General Motors' petition for certiorari, EPA stated that it reserved the right to challenge the existence of the four-month rule should this court grant certiorari. Brief for the United States in Opposition at 8 n.1 (November 1989). However, since EPA did not itself petition for review, and since that issue was not presented in General Motors' petition, such a right was not EPA's to reserve. *See* Sup. Ct. Rule 24.1(a). Moreover, as discussed below, the Court of Appeals' decision on this point is clearly not "plain error . . . evident from the record," and thus is not properly raised here at this point. *Id.*

A. The Statute Requires EPA To Act Upon SIP Revisions Within Four Months.

We begin with the language of the statute. Section 110(a)(2) of the Act, as noted above, establishes a detailed list of substantive and procedural requirements governing EPA's review of SIPs. 42 U.S.C. § 7410(a)(2). This provision requires EPA to approve, within four months, any SIP that provides for the attainment and maintenance of the national air quality standards and fulfills other technical and procedural requirements. Congress anticipated that the design and implementation of SIPs would be a continuing process, and thus provided in § 110(a)(3) of the Act for the revision of SIPs by the states. 42 U.S.C. § 7410(a)(3).

This authority for SIP revisions does not contain a separate list of requirements for EPA approval. Instead, it simply provides that EPA "shall approve any revision of an implementation plan [if the Administrator of EPA] determines that it meets the requirements of paragraph [§ 110(a)(2)] and has been adopted by the State after reasonable notice and public hearings." *Id.* Section 110(a)(2) requires EPA action on SIPs within four months. Although there is no express deadline in § 110(a)(3) for EPA action on SIP revisions, the express incorporation of the substantive and procedural requirements of § 110(a)(2) makes it evident that Congress intended the four-month time limit for action on SIPs to apply to SIP revisions as well.[14] In short, all of the requirements of § 110(a)(2), including the four-month rule, apply with equal force to EPA review of SIP revisions under § 110(a)(3).

There is no reason to believe that Congress regarded the expeditious approval of SIP revisions to be any less

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[14] Further support for this conclusion is found in 42 U.S.C. § 7410(g), which discusses circumstances in which EPA has not acted on a SIP revision designed to prevent plant closings "within the required four month period." *See* note 34 below.

important than the approval of original SIPs. As this Court stated in discussing section 110(a)(3) in *Train*, *supra*:

> "Far from evincing congressional intent that the Agency assume control of a State's emission limitations mix once its initial plan is approved, the revision section is to all appearances the mechanism by which the States may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards."

421 U.S. at 80. The Court pointed out that the statute "left to the States considerable latitude in determining specifically how the standards would be met. This discretion includes the continuing authority to *revise* choices about the mix of emission limitations." *Id.* at 87 (emphasis added).

All of the courts of appeals that have had occasion to address this issue, including the decision below, have concluded that the four-month rule applies to SIP revisions as well as to original SIPs. *American Cyanamid Co.*, *supra*; *Duquesne Light Co.* v. *EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983); *Council of Commuter Organizations* v. *Gorsuch*, 683 F.2d 648, 651-52 (2d Cir. 1982); *Council of Commuter Organizations* v. *Thomas*, 799 F.2d 879, 888 (2d Cir. 1986); *United States* v. *Alcan Foil Products*, 889 F.2d 1513 (6th Cir. November 21, 1989).[15] EPA's position that it may act on SIP revisions at its convenience is thus contrary to the unanimous weight of judicial authority.

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[15] *See also Sierra Club* v. *EPA*, 719 F.2d 436, 469 (D.C. Cir. 1983), *cert. denied*, 468 U.S. 1204 (1984). In a one-line dictum in a footnote, the Sixth Circuit previously suggested that the four-month rule might not apply to SIP revisions. *United States* v. *National Steel Corp.*, 767 F.2d 1176, 1182 n.1 (6th Cir. 1985). However, in its recent opinion in *Alcan Foil Products*, *supra*, the Sixth Circuit disavowed that dictum and held that the four-month rule does apply to SIP revisions.

B. The Four-Month Rule Serves As An Important Check On EPA Efforts To Run State Programs And Acts To Preserve The Primary Role Of The States.

A fundamental problem with the First Circuit's decision is its assumption that the four-month rule is simply a procedural device, and that a judicially determined "reasonableness" test should be substituted for the provision enacted by Congress. There is no discussion in the First Circuit's decision of the function of EPA's review, and the court thus failed to grasp the rationale for the enforcement bar in *American Cyanamid*. One or two years might be a reasonable time for review if EPA were supposed to be undertaking a comprehensive review of all of the details of a SIP submission. However, that is not the role intended by Congress. Instead, Congress gave EPA a limited role in reviewing SIPs and specified four months as a reasonable time for EPA to exercise that function. Allowing EPA an open-ended review of SIPs gives the Agency a licence to ignore state policy choices and to frustrate the intent of Congress.

In order to ensure that state prerogatives are given full effect, Congress has carefully limited EPA's ability to interfere with a State's SIP and SIP revision by (1) requiring final EPA action within four months, and (2) explicitly limiting the grounds upon which EPA may decline to approve a SIP or SIP revision. 42 U.S.C. § 7410(a)(2), (3); *Train* v. *Natural Resources Defense Council*, *supra*, 421 U.S. at 79.[16] The four-month rule must thus be viewed in

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[16] The legislative history indicates that Congress regarded time limits on EPA's review of SIPs as important to the efficient and expeditious attainment of air quality goals. *See, e.g.*, S. Rep. No. 1196, 91st Cong., 2d Sess. 21 (1970), *reprinted in* 1 U.S. Senate Committee on Public Works, *A Legislative History of the Clean Air Act Amendments of 1970*, at 421; *see also* 1 *1970 Legislative History*, at 385 (Senate debate).

the context of broader Congressional concern as to EPA's limited role.

The legislative history of the 1977 amendments to the Act underscores the intent of Congress to preserve the "primary responsibility" of the states. 42 U.S.C. § 7401(a)(3). The Senate Report states that Congress was concerned with the need to augment the "authority" and "responsibility" of state and local air pollution control programs.[17] States and localities are given "broad discretion to make decisions" within the framework of national policy. S. Rep. No. 95-127, *supra*, at 10. The report also stresses that the "Federal role must be one of support rather than control. The Federal Government does not and will not have the resources required to do an effective job of running" state air pollution control programs. *Id.* The report concludes that EPA will "protect and enhance air quality" more by fulfilling its "support" role rather than by trying to run state programs. *Id.*

Numerous decisions by this Court and lower federal courts have underscored the primary role of the states in developing and implementing SIPs. This Court held in 1975 that "[t]he Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2). . . ." *Train* v. *Natural Resources Defense Council*, *supra*, 421 U.S. at 79. In *Union Electric Co.* v. *EPA*, 472 U.S. 246, 265-67 (1976), the Court again emphasized the primary role of the states in establishing and implementing regulations under the Act, holding that economic and technological issues should be addressed to the state agency formulating the plan, not to EPA.

[17] S. Rep. No. 95-127, 95th Cong., 1st Sess. 10 (1977). The 1977 House report also stressed that one of the Act's principal purposes was "to give the States more flexibility in determining how to protect public health while still permitting reasonable new growth." H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 213 (1977). Similar views were expressed during debate on the 1970 amendments. *See, e.g.*, 1 *1970 Legislative History* at 113, 127.

Since this Court's decisions in *Train* and *Union Electric Co.*, the lower courts have consistently underscored the importance of the states' role as primary designers and implementers of regulations under the Act.[18] The Eighth Circuit succinctly summarized the federal-state division of authority under the Act:

> "[T]he Clean Air Act creates a partnership between the states and the federal government. . . . The federal government through the EPA determines the ends—the standards of air quality—but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends through state implementation plans and timetables for compliance. . . . *The Clean Air Act is an experiment in federalism, and the EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the States.*"

Bethlehem Steel Corp. v. *Gorsuch*, *supra*, 742 F.2d at 1036 (emphasis added).

C. EPA's "Pocket Veto" Of A SIP Revision Frustrates The Statutory Scheme.

The division of federal and state authority in the Act is embodied in the specific and detailed limits on EPA's authority to interfere in a state's policy choices concerning air quality control. The statute does *not* permit EPA to write SIP requirements itself, either directly or indirectly, through manipulation of the review process. EPA's supervisory authority under the Act is limited to review of

[18] *See, e.g., Concerned Citizens of Bridesburg* v. *EPA*, 836 F.2d 777, 780-81 (3d Cir. 1987); *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145, 1148 (7th Cir. 1983); *Florida Power & Light Co.* v. *Costle*, 650 F.2d 579, 588 (5th Cir. 1981); *Mision Industrial, Inc.* v. *EPA*, 547 F.2d 123, 129 (1st Cir. 1976).

state actions; unless a state fails to promulgate a SIP, EPA is not permitted to promulgate SIP requirements itself.[19] As the Eighth Circuit concisely phrased it, "[t]he state proposes, [and] the EPA disposes." *Id.* at 1036. Under the statute, EPA has only *two choices* in responding to a SIP revision, approval or disapproval. There is no middle course. *Train* v. *Natural Resources Defense Council*, 421 U.S. at 79-80.

By ignoring the four-month rule, however, EPA has effectively created for itself a *third* option, and thus has assumed greater powers than Congress conferred. If EPA agrees with a revision, it approves it. If EPA disagrees with the revision the Agency simply ignores it, often for years at a time.[20] This "pocket veto" power is nowhere authorized in the statute, and it is directly contrary to Congressional intent that the *states*, not EPA, have the authority to choose among alternative regulatory options for implementing the Act. *Bethlehem Steel Corp.* v. *EPA*, 782 F.2d 645, 650 (7th Cir. 1986).[21] Where EPA "pocket

[19] When a state fails to promulgate a SIP (or fails to revise and resubmit a SIP that EPA has validly disapproved), EPA may, after compliance with additional procedural requirements, promulgate a SIP on behalf of the state. 42 U.S.C. § 7410(c). If the Agency finds that an existing SIP no longer satisfies the statute, it may require the state to revise it. 42 U.S.C. § 7410(a)(2)(H).

[20] By delaying action, EPA has effectively imposed on the state its decision to recognize and enforce the original SIP, contrary to the considered choice made by the state to amend the SIP.

[21] In *Indiana & Michigan Electric Co.* v. *EPA*, 733 F.2d 489 (7th Cir. 1984), the State of Indiana promulgated a SIP that included both a stringent ceiling on certain sulfur dioxide emissions and a provision that compliance with the ceiling would be measured through 30-day averaging. EPA approved the emissions limit, but "deferred" action on the averaging provision. The court found that EPA had "effectively disallow[ed] an integral part of a plan provision without determining that the part violates the requirements of the Act." *Id.* at 492. Such an approach, the court held, was inconsistent with the state's entitlement to have its plan evaluated on the merits and in the form submitted.

vetoes" a SIP revision by failing to act upon it for months, or even years, beyond the statutory four-month period, the Agency appropriates for itself the *de facto* power to effectively disapprove a SIP through inaction—all without having to comply with the procedural and substantive limitations on such disapproval that would otherwise apply under Section 110(a)(2) of the Act.[22] In short, pocket vetoes hold the states' legitimate policy choices hostage to EPA's dilatory schedule.

In numerous cases decided since the 1970 amendments to the Act, the courts—including this Court—have stressed that the statute means what it says on the scope of EPA authority in this area, and that the powers expressly granted the Agency under the Act are the *only* ones that it possesses. Thus, for example, this Court held in *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), that EPA may not consider in its SIP review process factors, such as technical feasibility, that Section 110(a)(2) of the statute does not expressly permit it to consider. The courts have also stressed that the provisions of Section 110 are integral to the statutory scheme, and that EPA may not ignore those provisions—or invent new devices—where the effect is to increase EPA's involvement in the promulgation and implementation of SIPs at the expense of the states.[23]

[22] A "pocket veto" of a SIP revision also may have the effect of denying states and interested parties any opportunity for judicial review, since there is arguably no "final agency action" on which review may be sought.

[23] For example, although EPA is permitted under certain circumstances to approve a SIP in part and disapprove it in part, it may not do so where the effect would be to render the approved portion of the SIP more stringent than the state intended. *Bethlehem Steel Corp* v. *Gorsuch*, 742 F.2d at 1037; *Indiana & Michigan Electric Co.* v. *EPA*, 733 F.2d 489 (7th Cir. 1984); *see State of Michigan* v. *Thomas*, 805 F.2d 176, 186 (6th Cir. 1986). If EPA finds that a plan requirement is not sufficiently stringent to achieve national standards, then the Agency must follow the procedures established under the Act for pro-

These decisions, and the mischief created by EPA inaction, underscore the need to ensure that EPA acts on SIP revisions within the four-month statutory period.

II. EPA'S FAILURE TO TAKE PROMPT ACTION UPON A SIP REVISION BARS AGENCY ENFORCEMENT OF INCONSISTENT PROVISIONS OF THE PRE-EXISTING SIP.

Given EPA's obligation to act upon SIP revisions within four months and, as discussed below, EPA's deliberate policy of ignoring this obligation, the question presented is whether EPA should be barred from enforcing pre-existing SIP regulations that the states have revised. This issue has so far been considered by four courts of appeals, which have adopted different approaches to dealing with the problem. We submit that only the enforcement bar adopted by the court in *American Cyanamid* properly implements the statute.

A. Federal Enforcement Of SIP Requirements That A State Has Sought To Change Is Inconsistent With The Primary Role Of The States Envisioned In The Statute.

In *American Cyanamid Co.* v. *EPA*, the Fifth Circuit reviewed an EPA administrative penalty determination under Section 120 of the Clean Air Act.[24] In that case, the State of Louisiana had promulgated a SIP revision in 1982 that would permit American Cyanamid to install advanced

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mulgation of a substitute requirement; it may not avoid those procedures through a partial approval that distorts the state's plan to achieve the desired stringency. *Bethlehem Steel*, 742 F.2d at 1035.

[24] Under Section 120, EPA is empowered to impose administrative penalties on noncomplying sources. Section 113 of the Act, under which this action arises, permits EPA to seek civil penalties and injunctive relief through an action in federal district court. The distinction between these two enforcement remedies is not important for purposes of the issues currently before the Court. *See United States* v. *Alcan Foil Products*, *supra*, slip op. at 9-10.

technology and measure its compliance with emission limits on the basis of emissions trading or a "bubble."[25] Cyanamid agreed to install extra controls beyond those otherwise required on its major sources in return for an exemption for certain minor sources. The net result was a significant reduction in overall emissions. 810 F.2d at 497. EPA never acted on the revision. Indeed, to date the Agency has *still* not taken final action to approve or disapprove that revision. Instead, in 1984 EPA initiated a proceeding against American Cyanamid for failure to comply with the old Louisiana SIP for the minor sources.

The Fifth Circuit held that under these circumstances an enforcement proceeding that simply ignored the SIP revision was inconsistent with the statute. The court found that a bar on enforcement was necessary to preserve the authority of the states under the Act, and that absent such a bar, "EPA loses nothing by its contumaciousness." 810 F.2d at 499. The court therefore held that "EPA may not collect a penalty for the period between (1) four months after a state submits a proposed revision and (2) the date the EPA rejects that revision." *Id.* at 500.

The Fifth Circuit's decision in *American Cyanamid* expressed concern with the impact of EPA's deliberate disregard of the states' prerogatives under the Act:

> "Where, as here, the state has proposed a revision to its SIP which clearly authorizes local businesses to act in accordance with it without running afoul of the Clean Air Act, the interest of the state itself is deeply involved in the required four month approval or disapproval of the proposed revision. It distorts the statutory scheme to place virtually full emphasis upon the business entity involved as a charged "polluter."

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[25] *See generally, Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). As in this case, the SIP revision was promulgated in response to a published EPA policy.

> The emphasis of the statute, rather, is upon the important role which the state plays in defining authorized emissions. . . . The issue then is not so much pollution by American Cyanamid but the default of the EPA in carrying out the congressional intent to work in close cooperation with the states in implementing standards and enforcing the Clean Air Act."

810 F.2d at 500. Thus, the court pointed out, the obvious unfairness of the situation to American Cyanamid was almost beside the point:

> "We emphasize the importance of the EPA acting, not for the benefit of American Cyanamid, but for the benefit for the State of Louisiana which is by statute designated to play a significant cooperating role with the EPA."[26]

As the Fifth Circuit recognized, EPA enforcement of a pre-existing SIP that the state has attempted to change is fundamentally inconsistent with Congress's intent that states play the primary role in promulgating and implementing SIP requirements. By simply ignoring the states' changing policy choices embodied in SIP revisions, or delaying until the issue is moot, EPA effectively destroys the statute's carefully crafted balance of state and federal authority.

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[26] *Id.* The Fifth Circuit recently held that a similar bar applies to enforcement of EPA's belated disapproval of a delayed compliance order issued by a state under Section 113(d) of the Act. *General Motors Corp. v. EPA*, 871 F.2d 495 (5th Cir. 1989). In that case, EPA had sought to disapprove an order issued by the State of Texas, even though the statutory deadline for EPA review had long passed, and even though the order itself had ceased to be effective by its own terms. The Fifth Circuit held that belated EPA disapproval of the order under those circumstances could not be effective for purposes of enforcement. The court found that permitting effective EPA disapproval in such a case would interfere with the "authority of the states as the primary regulators of air quality under the Clean Air Act." *Id.* at 499-500.

The court below expressed concern that the Fifth Circuit had struck the wrong balance between the states' interests under the Act and the public's interest in pollution prevention. 876 F.2d at 1067. This concern rests on a misunderstanding of the issue at hand: the question here is not whether the public interest should be sacrificed to some other value, but rather whether the states or EPA have the primary role to identify and effectuate the public interest in the first place. Under the Clean Air Act, this role is given to the states. SIP revisions represent a considered judgment by the state, after the benefit of public hearings, as to the best way to implement the national standards and to serve the public in light of changed circumstances. Thus, in barring enforcement against American Cyanamid the Fifth Circuit did not sacrifice the interest of Louisiana citizens in clean air; it vindicated the right of Louisiana, not EPA, to decide what the public interest was in that situation.[27]

Similarly, in this case, the question is not whether the interest of Massachusetts citizens in clean air should triumph over EPA's procedural misconduct; but rather

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[27] This conclusion is not dependent upon any assumption about the ultimate approvability of the SIP revisions at issue. The State's judgment that *some* change in its SIP is appropriate must be accorded substantial deference. Even if EPA identifies a deficiency in the submitted revision, it does not follow that *any* revision would be invalid and that the State would not be able to amend the revision to meet EPA's concerns. Thus, for example, if EPA had rejected the *American Cyanamid* bubble revision within four months, the State might have been able to repromulgate the revision in a manner that cured whatever deficiency caused EPA's concern.

Similarly, if EPA had rejected the Massachusetts revision promptly, the State and General Motors might have been able to work out an alternative strategy that attained at least some of the benefits of the original revision in a manner acceptable to EPA. By delaying action on the revision until after the revised deadline was long past, EPA deprived the State of these alternatives; indeed, the new paint shop was operational by the time EPA took final action.

whether the Commonwealth of Massachusetts or EPA has the right to decide how that interest in clean air is to be accomplished.[28] If a state is so fundamentally wrong in its judgment on this point that its decision, embodied in a SIP or SIP revision, violates federal requirements, then EPA should disapprove it. But EPA may not simply *ignore* a state's judgment about the interests of its own citizens, or delay its decision until the issue becomes moot.

In earlier proceedings in this case, EPA has expressed concern that industries might seek to circumvent regulatory requirements and deadlines by having state agencies adopt frivolous SIP revisions. This idle speculation, in addition to being insulting to the states, is clearly inconsistent with Congress's own perception and desire that the states be granted considerable deference in their design and implementation of SIPs. EPA's argument on this point displays EPA's own disdain for the states and their ability to make reasoned policy choices in this area. Congress, however, did not agree with this view, and it is Congress's view that must prevail.

B. The Remedy Fashioned By The Fifth Circuit In *American Cyanamid* Is An Appropriate, Non-Intrusive Response To EPA's Failure To Comply With A Mandatory Statutory Requirement.

The Fifth Circuit's remedy in *American Cyanamid* restores the balance of federal and state authority under the Clean Air Act. The key to the Fifth Circuit's approach is its deference to EPA: the court did not require EPA to complete its review of all SIP revisions within four months (although that is what the statute requires), nor did it threaten or impose any sanction against EPA for failing

[28] Massachusetts here decided that the long-term interests of its citizens in improved air quality warranted a temporary compliance extension in return for long-term emissions decreased substantially below that required by 310 CMR 7.18(7).

to meet this obligation as a general matter. Instead, the court simply held that EPA may not combine SIP revision delay with an enforcement action. If EPA wishes to initiate an enforcement action that is inconsistent with a pending SIP revision, then it must first act on the revision. If EPA does not devote resources to timely review of a revision, then it need not do so, as long as it does not try to use its resources instead to bring an inconsistent enforcement action.

Thus, the Fifth Circuit's approach leaves EPA's fate in the Agency's own hands. There is no permanent bar on EPA enforcement (unless, of course, the SIP revision is consistent with the statute and EPA is ultimately obligated to approve it). If EPA wishes to bring an enforcement action that is inconsistent with a pending revision, it simply has to act on the revision first.[29]

Available evidence suggests that the actual increased burden imposed on EPA by the *American Cyanamid* approach is minimal. The Agency has estimated that, of the approximately 350 SIP revisions it currently receives each year from all 50 states, only *nine* are relevant to enforcement actions by the Agency.[30] EPA can hardly argue that

[29] There could, of course, be circumstances under which quick action is required against a source that presents a substantial and immediate endangerment to public health. In such cases, however, Section 303 of the Act expressly grants authority to EPA to seek an emergency restraining order in federal district court. 42 U.S.C. § 7603(a). The penalty provisions of Sections 113 and 120 would not ordinarily be of immediate importance in such a situation. The effect that a pending SIP revision might have in a case brought under Section 303 has not yet been considered by the courts. That issue is certainly not presented in this case, where EPA did not seek to invoke its emergency authority—and clearly could not have done so in any event since the source at issue was already permanently closed at the time the action was brought.

[30] EPA, *Report of Audit: Review of EPA's Process for Approving/Disapproving State Implementation Plans and Revisions*, E1K6*8-11-0045-9100210, at 16 (March 1989) (copy lodged with the Clerk of the Court).

it would be an insurmountable task to identify this handful of revisions, which amounts to less than one SIP revision for each of the ten EPA regional offices, for timely review and action.[31]

Before the First Circuit, EPA argued that the *American Cyanamid* remedy is inconsistent with this Court's decision in *Brock* v. *Pierce County*, 476 U.S. 253 (1986). In that case, the Court held that the Department of Labor's failure to make a finding of misuse of federal grant funds within 120 days of an allegation, as required by the statute, did not bar the Department from later seeking to recover such funds. In this case, there is no dispute that EPA may still disapprove a SIP revision if it fails to do so within four months and that, once it does disapprove the revision, it may then enforce the old SIP prospectively.[32] The *American Cyanamid* remedy is thus entirely different from the one considered in *Brock*: EPA remains free to disapprove the revision, but if it does not act within four months, it may not collect penalties for the interim period.

There is also an important factual distinction between this case and *Brock* arising from the context in which the delay occurred. The Court's opinion in *Brock* did not suggest that the delay in question was the result of anything other than negligence on the part of Department officials. *See* 476 U.S. at 260. Here, in contrast, the delay is not simply the result of negligence by EPA officials; it constitutes the accepted and considered policy of the Agency, which admits that its policy is to ignore the four-month requirement. *See, e.g.*, J.A. 103-11; pages 28-31 below.[33]

[31] EPA has advance notice of SIP revisions when proposed by a state, so in practice the Agency has several months' lead time before the four-month period for EPA review begins to run.

[32] The *American Cyanamid* approach is therefore consistent with this Court's indication in *Train* v. *Natural Resources Defense Council*, *supra*, that a company seeking judicial review of EPA's disapproval of a variance may not rely upon the pendency of such review as a defense to an enforcement action. 421 U.S. at 92. Under the *American Cyanamid* approach, once EPA *does* act to disapprove a SIP revision, it is free to enforce the old SIP prospectively, even if the State or a private party seeks judicial review of that disapproval.

C. The Fifth Circuit's Approach Properly Implements Congress's View Of The "Reasonable" Time For EPA Review.

The First Circuit declined to follow *American Cyanamid* because it assumed, without citing any factual support, that EPA would not be able to comply with the four-month rule. 876 F.2d at 1067. EPA's failure to meet the four-month deadline is not simply a matter of inadvertence or inability, however, but rather a deliberate policy of indifference to state policy choices and a decision to use the SIP review process to assert control over state decisions in a manner that Congress rejected. The problem stems not from the limited period that EPA is given to fulfill its statutory role, but from EPA's efforts to expand its role into one that cannot be fully performed within the statutory period.

The First Circuit's approach in this case thus constitutes a deliberate second-guessing of Congress's decision on this issue.[34] The First Circuit assumed that the four-month rule

[33] Moreover, in *Brock*, the Department's delay in seeking recovery had no substantive impact on whether the funds were in fact misspent and should be recovered. Here, in contrast, EPA is seeking penalties for a violation that arguably would not have occurred at all if EPA had acted in a timely manner. Had EPA acted to disapprove the Massachusetts SIP revision within four months, both the Commonwealth and General Motors would have had an opportunity to explore other alternatives that might have been acceptable to EPA. By delaying to the point where the issue became moot, EPA completely eliminated this opportunity.

[34] The First Circuit incorrectly suggested in a footnote of its opinion that the *American Cyanamid* approach might render § 110(g) of the Act superfluous. 876 F.2d at 1069 n.6. Section 110(g) of the Act, 42 U.S.C. § 7410(g) allows a state to issue temporary emergency suspen-

embodies an error on the part of Congress and that EPA should be afforded more time by the courts. Yet the court cited no authority for this assumption, and none exists. When the statute was enacted, Congress evaluated the limited supervisory task that it was assigning to the Agency in evaluating a SIP or SIP revision, and determined that four months was a reasonable period of time to perform that task. As a matter of law, Congress has already established four months as a "reasonable" time for EPA to act. Any longer period of time is *per se* unreasonable.

EPA's failure to comply with the four-month rule in reviewing the Massachusetts SIP revision at issue here is not an isolated case. As discussed above, there have now been several litigated cases in which EPA has brought enforcement actions that are inconsistent with SIP revisions that, at the time the suits were brought, had been pending before EPA for many months, if not years.[35]

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sions of SIP requirements where necessary to prevent a plant from closing. This section envisions a situation where the state has adopted a SIP revision to provide relief to the plant, and the state concludes that a suspension of the previous SIP is appropriate without waiting for EPA to act on the revision "within the required four month period." *Id.* The *American Cyanamid* remedy, in contrast, would bar EPA enforcement only after the four month period expires, and thus would not make § 110(g) superfluous.

The First Circuit apparently interprets § 110(g) as requiring that the state wait until the four month period for EPA action on the SIP revision expires before issuing the suspension. This interpretation is not well founded, given the fact that the suspension is only effective under § 110(g)(2) for four months. Moreover, Congress obviously contemplated that any rare delay that occurred before EPA completed its review would not last beyond the four month suspension. Otherwise, § 110(g) would only serve to delay economic dislocations rather than preventing them as Congress intended.

[35] *See, e.g., American Cyanamid Co.* v. *EPA*, *supra* (SIP revision submitted for EPA review more than two years before enforcement action filed; no final action ever taken on revision); *United States* v. *Alcan Foil Products*, *supra* (SIP revision submitted for EPA review one year before enforcement action filed; EPA disapproved revision more than a year later, after district court granted summary judgment for defendant).

Moreover, despite the unanimous holdings of the courts that the Agency must complete its review of SIP revisions within four months, the Agency in fact makes no attempt to do so. EPA has adopted an internal policy that schedules review of SIP revisions to be completed in *fourteen* months. J.A. 103-11.[36] And as a practical matter, EPA frequently fails to meet even that self-extended deadline: the Agency recently published data showing that its *average* time for review of a SIP revision is approximately 30 months, and many revisions have been pending far longer.[37]

EPA has admitted publicly that the substantial delays encountered in its review of SIP revisions is largely the result of the Agency's own expansive view of its role in the review process, which infringes on state prerogatives. *See* EPA, *State Implementation Plan Processing Reform*, *supra*. Thus, for example, many substantial delays are attributable to the Agency's "inordinate concern for individual actions" and its insistence that SIP requirements "be similar State to State and source to source." 54 Fed. Reg. at 2216-17. This EPA-imposed requirement of consistency is, of course, directly *inconsistent* with the statute, which contemplates that, so long as national standards are met, states may apply *different* requirements to sources within their boundaries, depending upon each state's own environmental, economic, social, and political needs. Thus, in many cases, EPA delays its review of SIP revisions for

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[36] *See also State Implementation Plan Processing Reform*, 54 Fed. Reg. 2214 (1989).

[37] *See* EPA, *Report of Audit*, *supra*, at 8, 20-21. The experience of the Commonwealth of Massachusetts in this case was therefore apparently a typical one: EPA took approximately 33 months to complete its review of the Massachusetts revision involving the Framingham facility.

lengthy periods in order to ensure a consistency that Congress intentionally did *not* require.

Another important source of EPA delay is its deliberate practice of "holding," often for years, final action on pending SIP revisions pending formulation of new or revised EPA policies relevant to the revisions.[38] The Audit Report by EPA's Inspector General reveals that this was the cause of the delay at issue in the *American Cyanamid* case:

> "EPA published an interim policy in December 1982 for reviewing requests for emissions trading. However, a final policy was not developed until August 1986. In the interim, the review of SIP revisions requesting emissions trading was put on hold."[39]

In the case of American Cyanamid, the Agency has *still* not taken final action on the revision, which was submitted more than seven years ago. Obviously, Congress did not intend that EPA development of policies and guidance documents to assist the states would take precedence over timely action on the SIP revisions themselves.[40]

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[38] A related problem has been the "moving target syndrome," under which EPA review of a SIP revision that was consistent with EPA policy at the time it was proposed takes so long that the revision becomes inconsistent with a new or revised Agency policy. *Id.* at 2216. Although it has not yet been fully developed in the record, it appears that General Motors may well have been the victim of such a change in EPA policy. The Agency's 1981 policy clearly contemplated—and indeed encouraged—revisions of the type promulgated by Massachusetts in this case. Yet, as EPA stated in its proposed disapproval notice in this case, the Agency apparently later decided that it preferred to address delays in automobile painting emission requirements through an enforcement mechanism. *See* note 6 above.

[39] EPA, *Report of Audit, supra* at 12.

[40] EPA has also identified management problems, including excessive bureaucratic review requirements for even simple SIP revisions, a lack of accountability within the Agency for timely processing of SIPs, and the absence of an adequate system for tracking revisions through the process, as contributing to delays. 54 Fed. Reg. at 2216-17; EPA, *Report of Audit, supra*, at 7-9.

EPA has conceded that the lengthy delays in its review of SIP revisions seriously impede many of the fundamental goals of the Clean Air Act:

> "The EPA is concerned that uncertainty and excessive delays in processing SIPs frustrate the development of an optimum State/Federal partnership, cause confusion for sources regarding applicable regulations, and generally dampen initiative in State regulatory programs."

54 Fed. Reg. at 2214. Congress clearly did *not* intend EPA to undertake the detailed, highly bureaucratized review of SIPs that EPA's extended internal schedules now contemplate. The First Circuit's proposed remedy ultimately requires an evaluation by the district court of what constitutes a "reasonable" time for EPA review of SIP revisions. In suggesting that the district court should evaluate this issue on a case-specific basis, the First Circuit has all but ignored the fact that the issue is already decided by the statute itself.

III. ALTERNATIVE REMEDIES SUGGESTED BY EPA AND BY THE COURT BELOW ARE INADEQUATE, INTRUSIVE, AND CUMBERSOME.

The *American Cyanamid* remedy is most consistent with Congressional intent. The remedies proposed by the court below are entirely ineffective as meaningful remedies for EPA's failure to comply with the four-month rule, and are substantially inferior to the *American Cyanamid* remedy in achieving this goal. In addition, these alternative remedies would inevitably require substantial and detailed involvement by the lower courts in the day-to-day functioning of the Agency.

A. Alternative Remedies Are Insufficient To Give Full Effect To The Primary Role Of The States Under The Act.

The alternatives that have been suggested to the *American Cyanamid* remedy simply do not restore the primacy

of state authority intended by Congress that is stripped away by EPA's noncompliance with the four-month rule. The First Circuit's "penalty reduction" approach would consider the "reasonableness" of the delay and the resulting prejudice to the *defendant*, but would give no consideration to the serious prejudice to the state's interests resulting from EPA's disregard of the state's policy choices.[41] The remedy adopted by the Fifth Circuit in *American Cyanamid* is the only remedy that provides EPA a real incentive to act in a manner that respects and gives effect to the role of the states under the Act.

EPA's policy of delaying action on SIP revisions for extended periods of time, coupled with its enforcement of existing SIPs, inevitably has a serious negative impact on the states' ability to ensure that their SIPs reflect developments and changes in state priorities. Deferrals such as those involved here call for "hard choices, choices which the state regulator must make in the first instance." *General Motors* v. *EPA*, *supra*, 871 F.2d at 504. With no prospect that EPA will even try to act upon revisions in a timely manner, the states' practical ability to revise their SIPs is seriously impaired. This is particularly the case where the revision involves a short-term change in the SIP, such as the extension involved here. EPA has conceded that it "should not delay action on a SIP revision in such a manner as would thwart the state's intent in

[41] The alternative "remedy" suggested in the *Duquesne* decision—mere deferral of enforcement action with retroactive penalties if the revision is ultimately disapproved—does even less to address the needs of the states. As the Fifth Circuit pointed out in *American Cyanamid*, "the *Duquesne* holding provides little or no incentive to the EPA to abide by § 7410's four-month rule; the EPA loses nothing by its contumaciousness." 810 F.2d at 499. The states, on the other hand, lose just as much as if the courts ignored EPA's disregard of the four-month rule altogether. As long as EPA has no incentive to speed its review process, the ability of the states to implement changes in their plans will be effectively frustrated.

requesting the SIP revision."[42] Although EPA has given lip service to the need for timely action, the Agency's practice is in reality a far different matter. *See* pp. 28-31 above.

As discussed above, Congress clearly intended that regulation under the Clean Air Act be a flexible, continuously evolving process. The appropriate regulatory strategy for any particular source in any given location will inevitably be the function of a number of factors, including the level of emissions from that source and from other sources, the overall air quality in the area, the availability of control technology, the cost of that technology, the economic importance of the source's operations to the state, the environmental impacts of alternatives, and a host of other environmental, social, political, technological, and economic factors. Virtually all of these factors are subject to change over time. By denying the states an effective ability to revise their SIPs to reflect such changes, EPA denies the states the ability to tailor their SIPs to their own particular circumstances, as Congress intended. Moreover, if the courts were to permit EPA to proceed with enforcement actions that are inconsistent with SIP revisions, then companies will in the future decline to accept and act upon changed state requirements embodied in SIP revisions during the period (often years) of EPA review.

The First Circuit's alternative remedies condone EPA's delay in reviewing revisions and give states a disincentive to attempt innovative control strategies or to experiment with stringent, "technology-forcing" requirements. As this Court recognized in *Union Electric Co.*, *supra*, the question

[42] EPA, *Approval and Promulgation of Implementation Plans; Massachusetts Ozone Attainment Plan; Control of Gasoline Volatility*, 54 Fed. Reg. 19173, 19182 (1989) (declining to delay final action on SIP revision to permit further review in light of recently promulgated federal rules, since delay would interfere with state's intended date of effectiveness).

of technological feasibility of control requirements and the appropriate role of feasibility and cost in the adoption of such requirements is the province of the states under the Act. In both the *GM* and *Cyanamid* cases, for example, the controls installed under the SIP revisions resulted in lower emission levels than required under the initial SIPs. Normally, a state would be encouraged to experiment with such requirements. Yet if a state lacks the practical ability to change its SIP requirements, it will be reluctant to adopt such novel provisions. This, again, is directly inconsistent with Congress's intent in enacting the statute. *See Union Electric Co.* v. *EPA*, *supra*, 427 U.S. at 256-64.

B. EPA's Failure To Take Prompt Action On SIP Revisions Subjects Industry To Conflicting Federal And State Regulatory Requirements And Provides A Serious Disincentive To The Adoption Of Innovative Pollution Control Strategies.

EPA's SIP review delays also have seriously negative impacts on regulated industries. Probably the most important impact stems from the uncertainty caused by EPA's delays. *See* EPA, *State Implementation Plan Processing Reform*, *supra*, 54 Fed. Reg. at 2214. When a state revises its SIP, that revision immediately has the force of state law. The revision acquires the force of federal law only when EPA approves it. When EPA delays for an extended period its action on a SIP revision, therefore, the result is considerable uncertainty as to what the applicable standards actually are and will be.[43]

[43] Under the statute, this uncertainty can exist for up to four months in any event, since EPA is given that long to complete its review of the proposed revision. However, in the vast majority of cases four months of uncertainty is a relatively minor inconvenience compared to the years of uncertainty that EPA actually imposes by its lengthy delays in reviewing SIP revisions.

This situation also creates a strong potential for anomalies in enforcement. Since a revised SIP changes state law, a state that adopts a revision may enforce only the revised SIP. EPA's position, on the other hand, is that it may continue to enforce the old SIP, regardless of whether a violation exists under the revised SIP.[44] It is absurd to suggest that Congress intended that a Clean Air Act SIP, which is the product of joint federal and state effort under the same statute, would be enforceable in one form at the federal level and in an entirely different form at the state level. *See Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d at 1151. Indeed, depending upon the nature of the revision and of the original SIP requirements, it is possible for a regulated entity to be faced with *inconsistent* federal and state requirements—and to be subject to enforcement action by either EPA or the state no matter what it does. *See General Motors Corp.* v. *EPA*, 871 F.2d 495, 501 (5th Cir. 1989).[45]

[44] In the case of delayed compliance orders, which, like SIP revisions, are promulgated by the states and then approved by EPA, the Agency has affirmatively encouraged the states to prosecute sources for noncompliance with the requirements of such orders during the period of EPA review. *See General Motors Corp.* v. *EPA*, *supra*, 871 F.2d at 501 (*citing* Memorandum from Marvin B. Durning, Assistant Administrator for Enforcement, to Regional Administrators, Regional Enforcement Directors (July 27, 1978)).

[45] Thus, for example, if the federally-approved SIP requires a source to install Equipment A to control emissions, and a SIP revision is adopted (but not acted on by EPA) that requires Equipment B to be installed, the source could be sued by the State if it fails to install Equipment B and sued by EPA if it fails to install Equipment A. This would obviously be an anomalous situation. If the two types of equipment are mutually exclusive, the source will be in a "no win" situation; its only alternative will be to shut down altogether. In this case, since the two alternative approaches embodied in the original and revised Massachusetts SIP requirements were economically (although not technically) inconsistent, this was essentially the situation in which General Motors found itself. The Commonwealth and GM were entitled to rely

Without an effective remedy for EPA's failure to take timely action on a SIP revision, industries will be unwilling, if not simply unable, to undertake improved compliance strategies of the type undertaken by General Motors in this case. Although there were competitive as well as environmental reasons underlying General Motors' decision to switch to the basecoat/clearcoat system, it would clearly have been cheaper in the short term for General Motors simply to add controls to the old facility and meet the old SIP deadline. If General Motors had known that EPA would "pocket veto" the SIP revision, and that it might be subject to substantial penalties for adopting the state-approved compliance strategy, it might well have selected this less expensive approach. The First Circuit's holding will discourage companies in a similar position from using innovative technologies.

Perhaps the greatest anomaly in enforcement is the Agency's attempt to seek penalties for conduct that EPA itself does not necessarily believe to be "wrong." The *American Cyanamid* case itself is a classic example of this situation. In that case, EPA had been unable to make up its mind whether the "bubble" that the company was relying upon was or was not consistent with the Act, even though the revision incorporating that bubble had been pending before the Agency for more than two years. Yet EPA asked the court to confirm substantial penalties against the company for relying upon the bubble. In other words, EPA asked the court to agree to penalize the company for doing something "wrong" even though EPA itself could not make up its mind whether the company's conduct was "wrong" at all. Indeed, if EPA had had its way in that case, American Cyanamid would by now have been assessed the penalty and paid it,[46] even though EPA has

on EPA's published 1981 policy absent timely EPA action on the SIP revision.

[46] The decision below, coupled with EPA's enforcement policy, may also coerce companies into settling unjustified enforcement actions.

still not decided whether the company's bubble is or is not consistent with the Act.

C. A Bar On Enforcement Actions That Are Inconsistent With Pending SIP Revisions Upon Which EPA Has Failed To Act Within Four Months Is Necessary To Preserve The Integrity Of EPA's SIP Review Process.

The *American Cyanamid* remedy is also important as a mechanism to ensure the fair and even-handed review of SIP revisions by EPA. As the Fifth Circuit pointed out, it will be difficult, if not impossible, for EPA to review a SIP revision objectively when it has already initiated an enforcement proceeding. Once the Agency has gone so far as to initiate an enforcement action in support of the pre-existing SIP, the pressure to reach a consistent result in reviewing a concurrent SIP revision will be overwhelming for even the most well-meaning EPA officials. As a result, there is a substantial danger that permitting such enforcement actions to proceed "may encourage the EPA to reject [SIP] revisions that it should accept." 810 F.2d at 499. As a practical matter, once the enforcement proceeding has begun, officials will inevitably be "reluctant to approve [a state's] revision and admit that [the company] is not liable for noncompliance after all." *Id.* In those circumstances, "EPA's even-handed administration of the Act" will be open to substantial question. *Id.*; *see also General Motors Corp.* v. *EPA*, 871 F.2d 495, 501 (5th Cir. 1989).[47]

[47] The First Circuit suggested in its opinion in this case that this argument "proves too much," and that "the potential for Agency bias results, not from the Agency's failure to complete its review within four months but from Congress' decision to assign the EPA the responsibility for both reviewing plans and enforcing them." 876 F.2d at 1068-69. Congress obviously did not foresee (1) that the "Chinese wall" between EPA's regulatory and enforcement branches would be torn down by EPA's policy of putting the enforcing cart before the regulatory horse, or (2) that EPA would act in a way that undermines the

This concern is particularly strong in this case. After July and August 1987, when the old Framingham paint facility shut down and the new deadline established by the SIP revision passed, the revision ceased to have any relevance whatsoever in the regulatory context. After that point, the revision, and EPA's review of it, had continued relevance *only* to this enforcement action which itself was filed after the regulatory issue had become moot.[48] EPA's act of publishing its final disapproval the day its brief was due and filed in the First Circuit unmasked its pretense of objectivity; this action served no purpose except to support the Agency's enforcement efforts in this proceeding.

Because the SIP revision in this case was by its nature temporary, EPA's delay raises special concerns. If EPA acts promptly, it must consider the merits of the SIP revision and, if it has objections, advise as to what might be done to meet these objections. If EPA fails to act, the state and the company are "without guidance or options."

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primary role of the states.

There is a very significant practical difference between the potential internal tensions in EPA's role that the First Circuit identified and the even stronger tensions that are created when EPA commits itself publicly to an enforcement action without first completing a regulatory decision that might have the effect of mooting that action. In such a case, there will be extremely strong pressure on Agency officials to disapprove the revision in order to avoid subjecting the Agency to criticism for wasted resources and unfair harassment of the regulated community.

[48] EPA made it clear as early as December 1986, when it published its Notice of Proposed Rulemaking, that it was considering the Massachusetts revision and the Agency's enforcement strategy as a single package and was inclined to the view that "[e]xtensions of the December 31, 1985 date should instead be obtained through an enforcement mechanism." 51 Fed. Reg. 43394, 43395 (1986). The Agency thus conceded that its regulatory and enforcement decisions were part of a single, combined strategy in which enforcement would be given priority. At that point, objective review of the revision became a practical impossibility.

General Motors v. *EPA*, *supra*, 871 F.2d at 500. When EPA "dawdles not only beyond" the statutory four month period but, as happened here, "past the expiration date of [the SIP revision], the EPA's review of the [SIP revision] necessarily takes on an abstract, almost counterfactual character." *Id.* Once the Agency has decided to pursue enforcement, EPA is likely to disapprove the SIP for reasons that are simply window dressing for its enforcement action. The filing of an enforcement action before the regulatory process has been completed totally skews the regulatory process. *Id.* at 501.

One need not presume actual misconduct on the part of EPA officials in order to recognize that such a situation seriously undermines the federal-state partnership upon which the Clean Air Act is based. Where, as here, EPA's delay continues for so long that completion of the review process has no practical purpose other than support of the Agency's commitment to an enforcement action, there will, at minimum, inevitably be a strong appearance of impropriety. "Common sense suggests that something is amiss when an agency purports to disapprove an expired order after the fact."[49] Such an appearance undermines confidence of the public and the regulated community that SIP revisions will be reviewed by the Agency on their merits, unprejudiced by extraneous Agency priorities. An appearance of bias may discourage states from revising SIPs containing innovative solutions to attain air quality standards. By creating the appearance that its review is in fact influenced, if not governed, by such extraneous factors, EPA does a substantial disservice both to its state partners and to the public.

The Fifth Circuit's approach in *American Cyanamid* serves to further the "even-handed administration of the

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[49] *General Motors* v. *EPA*, *supra*, 871 F.2d at 504.

Act" by barring EPA from committing itself to an enforcement action until the Agency has made up its mind about the validity of the SIP revision. The First Circuit's approach, on the other hand, does little or nothing to address this problem. Since the First Circuit would permit enforcement actions to proceed in these circumstances, the pressure on EPA to disapprove SIP revisions in cases subject to enforcement actions will continue unabated. In this respect as well, therefore, the Fifth Circuit's approach is clearly superior to that of the First Circuit.

D. The *American Cyanamid* Remedy, Unlike Other Proposed Remedies, Does Not Require Extensive And Continuing Judicial Involvement In EPA's Allocation Of Agency Resources.

In contrast to the First Circuit's "two-fold" remedy, the *American Cyanamid* enforcement bar involves relatively little judicial interference with EPA's administrative and enforcement decisions. EPA is left entirely free to decide when it will act on a SIP revision. It is also left entirely free to prosecute any enforcement action that it chooses—provided that it first acts on any SIP revision that, if approved, would be inconsistent with such an action.[50] How EPA makes these decisions, and how it allocates its resources to support them, is left entirely to the Agency's discretion, and the courts would not examine how that discretion is exercised.

The alternative remedies proposed by the First Circuit in this case are a very different matter. The First Circuit suggested that there should be two principal remedies available for dealing with EPA's delay: (1) consideration by the district court in a penalty action of the reasonableness of the delay as a factor relevant to the amount

[50] As noted at pp. 25-26 above, this should not be difficult for EPA to accomplish.

of penalties, and (2) a civil action pursuant to Section 304(a)(2) of the Act to compel EPA to act.[51]

The First Circuit's "penalty reduction" approach would result in intense judicial examination and involvement in EPA's internal management. If the "reasonableness" of EPA's delay is a factor relevant to the determination of penalties,[52] then the way in which EPA goes about deciding how to conduct its review of the revision, including its internal schedule for review, the manpower assigned to the project, and similar matters, would be open to examination.[53] The court would have to decide, *inter alia*, whether the Agency should have committed more resources to reviewing the particular revision at issue, or whether the review process should have been managed more efficiently. Ultimately, the court would be required to examine and opine on the efficiency and reasonableness of EPA's internal management.[54] Obviously, this burden-

[51] 876 F.2d at 1067-68. Section 304(a)(2) authorizes a civil action by "any person" to compel EPA "to perform any act or duty under this Act which is not discretionary. . . ." 42 U.S.C. § 7604(a)(2).

[52] In stating the relevant standard for judging EPA's delay as one of "reasonableness" (876 F.2d 1068), the First Circuit appears to have misinterpreted existing law on the defenses available for noncompliance with mandatory statutory deadlines. The courts have traditionally regarded such noncompliance as excusable only where compliance is impossible. *See* n. 60 below. As a matter of law, no other type of delay can be regarded as "reasonable" where Congress has mandated that the Agency act within a specific period of time.

[53] The district court may also become enmeshed in consideration of the merits of EPA's decision to disapprove the SIP revision, even though judicial review on that subject is normally within the jurisdiction of the court of appeals. 42 U.S.C. § 7607(b)(1).

[54] *See, e.g., Natural Resources Defense Council* v. *Thomas*, 705 F. Supp. 1, 4 (D.D.C. 1988). In many cases, such a defense would presumably require factual findings following a trial. In such cases, the State or other party bringing the action would presumably be entitled to discovery concerning EPA's handling of the revision.

some and difficult task should not lightly be visited on the courts.

The mandamus remedy suggested by the First Circuit suffers from similar deficiencies. A suit by companies or states to compel Agency action under § 304 of the Act will require the diversion of resources by all parties to expensive and time-consuming litigation.[55] Given EPA's track record in acting on SIPs and complying with other statutory deadlines, even when faced with litigation, this remedy is not likely to be effective. In *Alcan Foil Products*, for example, the Commonwealth of Kentucky had filed an action under Section 304(a) even before EPA brought its enforcement action against Alcan.[56] As of the time of the Sixth Circuit's decision, the state had received no relief. The Sixth Circuit concluded that the remedy under Section 304 was therefore "not very effective." Slip op. at 14. The Sixth Circuit's conclusion is supported by the dilatory EPA action in complying with mandatory statutory deadlines and court orders in similar contexts.[57]

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[55] The courts that have addressed EPA's failure to comply with the four-month rule have treated such compliance as a nondiscretionary duty. *See* p. 14, *supra*. This treatment is consistent with this Court's rulings in *Train* v. *Natural Resources Defense Council* and *Union Electric Co.* v. *EPA* that the requirements of Section 110(a) are mandatory in nature. *See Train*, 421 U.S. at 79-80; *Union Electric Co.*, 427 U.S. at 256.

[56] In this regard, we would note that Congress can hardly have intended that states would have to sue EPA to preserve their role in the federal-state partnership created by the Act. In *American Cyanamid*, the Fifth Circuit rejected EPA's suggestion that parties aggrieved by EPA's failure to meet the four-month deadline were limited to a remedy under § 304 of the Act. As the court pointed out: "EPA must review a revision within four months whether or not the state or some other party sues to hasten its decision. A suit to force the agency to act is one remedy, but should not be the only remedy for delay, once the interests of the *states* themselves are recognized." 810 F.2d at 501, n.11 (emphasis added).

[57] For example, EPA missed—in many cases by years—the statutory

Such delay can make a § 304 remedy meaningless, and thus ineffective to deal with the intrusion on state prerogatives.

Even leaving aside the problem of effectiveness, the scope of judicial involvement in EPA's internal policymaking and administration in § 304 suits would be dramatically increased if the First Circuit approach is followed rather than that in *American Cyanamid*. Absent a bar on enforcement, the only way that a source subject to a SIP revision could protect itself against penalties for violating the old SIP would be to file a Section 304 action. Under these circumstances, *every* such source may feel compelled to do so, no matter how certain it might be that EPA would ultimately approve the SIP revision.[58] States may also routinely file such suits. Instead of facing a possible enforcement bar for only a handful of cases, therefore, EPA would be faced with Section 304 lawsuits across the country for a large proportion of the SIP revisions it re-

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four-month deadline for review of *original* SIPs promulgated to meet the NAAQS for lead. In 1983, pursuant to a settlement agreement in an action brought under Section 304, the United States District Court for the District of Columbia entered a consent order requiring EPA to act promptly on the outstanding state plans. *See Natural Resources Defense Council* v. *Thomas*, *supra*, 705 F. Supp. at 2 (D.D.C. 1988). Yet several years later, EPA had still not completed its review of several of the SIPs, a delay that the district court characterized as "inexcusable." *Id.* at 4; *see also Sierra Club* v. *Ruckelshaus*, 602 F. Supp. 892 (N.D. Cal. 1984) (holding EPA in contempt for failure to comply with court order enforcing statutory deadlines for promulgation of regulations on hazardous air pollutants). Obviously, therefore, the remedy of a court order under Section 304 has at best a limited impact on the Agency's dilatory behavior.

[58] It would be cold comfort to a company that was considering acting in accord with the revised state regulation that EPA *might* not sue it, or that, if any enforcement action was brought, the unreasonableness of EPA's delay *might* result in a reduction of penalties. It is worthy to note that General Motors' request for an extension was submitted pursuant to a published EPA policy, and there was good reason to believe that the SIP revision was approvable. *See* n.5 above.

ceives every year.[59] If EPA resisted the issuance of such orders on the ground that prompt action in certain cases was impossible,[60] then a number of courts would have to examine in detail EPA's allocation of resources in its SIP review program, as well as other aspects of the management of that program, to assess the validity of that defense. This situation would raise the possibility of competing or even conflicting demands on EPA resources. If protective actions were filed by a large number of companies subject to SIP revisions, the end result would be virtually complete judicial management of EPA's SIP review program. Again, this is neither a result Congress intended nor a function for which the courts are best suited.

What the courts *are* well-equipped to do is to decline, as the Fifth Circuit did in *American Cyanamid*, to become parties to EPA's deliberate policy of flouting the procedural requirements of the Clean Air Act. By bringing en-

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[59] One wonders why EPA would support the First Circuit's mandamus remedy given its claim that it cannot meet the four-month deadline in any event.

[60] The courts have in certain cases recognized that there may be cases in which it is simply impossible for EPA to meet a statutory deadline. However, the courts have stressed that:

> "the agency [bears] a heavy burden to demonstrate the existence of an impossibility: 'An equity court can never exclude claims of inability to render absolute performance, but it must scrutinize such claims carefully since officials may seize on a remedy made available for extreme illness and promote it into the daily bread of convenience.' "

Alabama Power Co. v. *Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979) (quoting *NRDC* v. *Train*, 510 F.2d 692, 713 (D.C. Cir. 1974)); *see also Sierra Club* v. *Gorsuch*, 551 F. Supp. 785 (N.D. Cal. 1982); *Natural Resources Defense Council* v. *Thomas*, *supra*. Where, as here, EPA has converted noncompliance with the statutory deadline into "the daily bread of convenience" as a matter of policy, a detailed showing would be required in every individual case that prompt action on the revision at issue was in fact impossible.

forcement actions that ignore pending SIP revisions—without regard to the actual merits of those revisions—EPA seeks to invoke the power of the courts to impose penalties against parties who, even EPA must admit, might not have committed any violation if EPA had acted promptly.

Certainly Congress did not intend the enforcement provisions of the Act to be used to prosecute violations stemming from EPA's own delay in confirming a change in the applicable law. If EPA wants to seek administrative or civil penalties against a company for acting in a manner inconsistent with the Clean Air Act, then the Agency must first decide for itself whether the company's conduct is *in fact* inconsistent with the Act. That means that if the company would not be in violation if EPA approved a pending SIP revision, EPA must first act to complete its review of that revision before bringing an enforcement action.

CONCLUSION

For the reasons stated above, General Motors respectfully requests that the decision of the United States Court of Appeals for the First Circuit be reversed and that this case be remanded with instructions that an order be entered affirming the judgment of the District Court.

Respectfully submitted,

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APPENDIX

APPENDIX

Pertinent provisions of the Clean Air Act, 42 U.S.C. § 7401, et al., are as follows:

§ 7407. Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control re-

gion (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification,

construction, and operation of any stationary source, including a permit program as required in parts C and D and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply; . . .

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordinator Act of 1974 [15 U.S.C. 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) pro-

mulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e) of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted. . . .

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In the Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether a four-month time limit governs the Environmental Protection Agency's (EPA's) review of proposed revisions to State Implementation Plans (SIPs) under the Clean Air Act (42 U.S.C. 7410(a)(3)(A)).

2. Whether, if such a time limit is applicable, the proper remedy for EPA failure to take final action on a SIP revision within four months is to bar the United States from enforcing an existing SIP until EPA issues a final decision on the proposed revision.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	1
A. The statutory framework	1
B. The proceedings in this case	5
Summary of argument	11
Argument:	
I. The four-month limit for review of original SIPs under Section 110(a)(2) does not apply to review of proposed SIP revisions under Section 110(a)(3)(A)	14
II. Even if there is a four-month time limit for review of SIP revision proposals, EPA is not barred from enforcing the terms of an existing SIP once that deadline has passed	24
A. There is no support in the language or legislative history of The Clean Air Act for an enforcement bar	25
B. Less drastic remedies than an enforcement bar are available to address agency delay	29
Conclusion	45

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American Cyanamid Co. v. *EPA*, 810 F.2d 493 (5th Cir. 1987) ..... *passim*

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Cases – Continued: Page

Bethlehem Steel Corp. v. *EPA*, 638 F.2d 994 (7th Cir. 1980) 39
Blum v. *Bacon*, 457 U.S. 132 (1982) 15
Brock v. *Pierce County*, 476 U.S. 253 (1986) 12, 24, 30, 31, 32, 33
Buckeye Power Power, Inc. v. *EPA*, 481 F.2d 162 (6th Cir. 1973), cert. denied, 425 U.S. 934 (1976) 20
Chevron U.S.A. v. *Natural Resources Defense Council*, 467 U.S. 837 (1984) 3, 4
Costle v. *Pacific Legal Foundation*, 445 U.S. 198 (1980) 20
Council of Commuter Organizations v. *Gorsuch*, 683 F.2d 648 (2d Cir. 1982) 14
Council of Commuter Organizations v. *Thomas*, 799 F.2d 879 (2d Cir. 1986) 14, 33, 34
Cutler v. *Hayes*, 818 F.2d 879 (D.C. Cir. 1987) 34
Dayton Board of Education v. *Brinkman*, 433 U.S. 406 (1977) 15
Duquesne Light Co. v. *EPA*, 698 F.2d 456 (D.C. Cir. 1983) ..... *passim*
E.I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977) 43
EPA v. *National Crushed Stone Ass'n*, 449 U.S. 64 (1980) 24, 43
Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 37
General Motors Corp. v. *EPA*, 871 F.2d 495 (5th Cir. 1989) 27
Georgia v. *United States*, 411 U.S. 526 (1973) 33
Gwaltney of Smithfield, Ltd. v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) 19
Hallstrom v. *Tillamook County*, 110 S. Ct. 304 (1989) 15, 27
Harrison v. *PPG Industries, Inc.*, 446 U.S. 578 (1980) 29

Cases – Continued: Page

Illinois State Chamber of Commerce v. *EPA*, 775 F.2d 1141 (7th Cir. 1985) 5
Metropolitan Washington Coalition for Clean Air v. *District of Columbia*, 511 F.2d 809 (D.C. Cir. 1975) 26
Michigan v. *Thomas*, 805 F.2d 176 (6th Cir. 1986) . 22
Middlesex County Sewerage Authority v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) 40
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Northwest Central Pipeline Corp. v. *State Corporation Comm'n*, 109 S. Ct. 1262 (1989) 37
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Rainwater v. *United States*, 356 U.S. 590 (1958) ... 19
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Russello v. *United States*, 464 U.S. 16 (1983) 14, 27
Sierra Club v. *Thomas*, 828 F.2d 783 (D.C. Cir. (1987) 34
Thigpen v. *Roberts*, 468 U.S. 27 (1984) 15
Touche Ross & Co. v. *Redington*, 442 U.S. 560 (1979) 40
Train v. *Natural Resources Defense Council*, 421 U.S. 60 (1975) 2, 12, 25, 28
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 (1979) 40
TVA v. *Hill*, 437 U.S. 153 (1978) 43
Union Electric Co. v. *EPA*, 427 U.S. 246 (1976) ... 17

Cases – Continued: Page

United States v. *Alcan Foil Products*, 889 F.2d 1513 (6th Cir. 1989), petition for cert. pending, No. 89-104 ..... 11, 14, 25, 31, 34, 35, 41, 43
United States v. *Boccanfuso*, 882 F.2d 666 (2d Cir. 1989) 33
United States v. *Ford Motor Co*, 814 F.2d 1099 (6th Cir.), cert. denied, 484 U.S. 822 (1987) ....., 26, 42
United States v. *National Steel Corp.*, 767 F.2d 1176 (6th Cir. 1985) 20
United States v. *SCM Corp.*, 667 F. Supp. 1110 (D. Md. 1987) 43
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United Steelworkers of America v. *Rubber Manufacturers Ass'n*, 783 F.2d 1117 (D.C. Cir. 1986).. 23
United States v. *Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077 (3d Cir. 1987) 26
Washington v. *Yakima Indiana Nation*, 439 U.S. 463 (1979) 15

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Administrative Procedure Act:
5 U.S.C. 555 ..... 12, 20
5 U.S.C. 706(1) 12, 20, 31, 34
Clean Air Act, 42 U.S.C. 7401 *et seq.*:
§ 101(a)(3), 42 U.S.C. 7401(a)(3) 28
§ 107(a), 42 U.S.C. 7407(a) 2
§ 109, 42 U.S.C. 7409 2
§ 109(a)(1), 42 U.S.C. 7409(a)(1) 2
§ 109(a)(1)(A), 42 U.S.C. 7409(a)(1)(A) 15
§ 109(a)(1)(B), 42 U.S.C. 7409(a)(1)(B) 15
§ 110, 42 U.S.C. 7410 ..... 2, 6
§ 110, 42 U.S.C. 7410 note 18
§ 110(a), 42 U.S.C. 7410(a) 25, 28
§ 110(a)(1), 42 U.S.C. 7410(a)(1) 2, 15, 16

Statutes and regulations – Continued: Page

§ 110(a)(2), 42 U.S.C. 7410(a)(2) 2, 11, 14, 15, 16, 18, 24
§ 110(a)(2)(A), 42 U.S.C. 7410(a)(2)(A) 3, 16
§ 110(a)(2)(A)-(K), 42 U.S.C. 7410(a)(2)(A)-(K) 16
§ 110(a)(3), 42 U.S.C. 7410(a)(3) 3, 9, 18
§ 110(a)(3)(A), 42 U.S.C. 7410(a)(3)(A) ... 3, 11, 14, 15, 16, 18, 24, 27, 28
§ 110(a)(3)(B), 42 U.S.C. 7410(a)(3)(B) 17
§ 110(c), 42 U.S.C. 7410(c) 25
§ 110(c)(1), 42 U.S.C. 7410(c)(1) 17
§ 110(d), 42 U.S.C. 7410(d) 3, 12, 25, 37, 41, 1a
§ 110(f), 42 U.S.C. 7410(f) 27
§ 110(f)(1), 42 U.S.C. 7410(f)(1) 28
§ 110(g), 42 U.S.C. 7410(g) 18, 29, 27, 1a
§ 113, 42 U.S.C. 7413 ..... 9, 11, 12, 1a
§ 113(a), 42 U.S.C. 7413(a) 3
§ 113(a)(1), 42 U.S.C. 7413(a)(1) 11
§ 113(a)(2), 42 U.S.C. 7413(a)(2) 25
§ 113(b)(2), 42 U.S.C. 7413(b) 3, 10, 34, 35, 38
§ 113(b), 42 U.S.C. 7413(b)(2) 12, 25, 43
§ 113(c), 42 U.S.C. 7413(c) 3
§ 113(d), 42 U.S.C. 7413(d) 7, 17, 40
§ 113(d)(2), 42 U.S.C. 7413(d)(2) 27
§ 113(d)(10), 42 U.S.C. 7413(d)(10) 26
§ 116, 42 U.S.C. 7416 37
§ 120, 42 U.S.C. 7420 ..... 11, 24, 43
§ 120(d)(3)(C), 42 U.S.C. 7420(d)(3)(C) 43
§ 172, 42 U.S.C. 7502 ..... 3a
§ 172(b)(2)-(3), 42 U.S.C. 7502(b)(2)-(3) 6, 8
§ 172(b)(3), 42 U.S.C. 7502(b)(3) 38
§ 172(b)(6), 42 U.S.C. 7502(b)(6) 39
§ 173(2), 42 U.S.C. 7503(2) 39
§ 304, 42 U.S.C. 7604 3
§ 304(a), 42 U.S.C. 7604(a) 33, 34

Statutes and regulation—Continued: Page

§ 304(a)(1), 42 U.S.C. 7604(a)(1) 37
§ 304(a)(2), 42 U.S.C. 7604(a)(2) 10, 34
§ 304(b)(1)(B), 42 U.S.C. 7604(b)(1)(B) 38
§ 304(f)(1), 42 U.S.C. 7604(f)(1) 37
§ 304(f)(3), 42 U.S.C. 7604(f)(3) 37
§ 307(b), 42 U.S.C. 7607(b) 39
§ 307(b)(1), 42 U.S.C. 7607(b)(1) 29, 39
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p. 36,012 ..... 8, 20
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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-369

GENERAL MOTORS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-18a) is reported at 876 F.2d 1060. The opinion of the district court (J.A. 119-125) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on June 7, 1989. The petition for a writ of certiorari was filed on September 5, 1989, and granted on December 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Clean Air Act, 42 U.S.C. 7401 et seq., are set out in the Appendix to petitioner's brief and in the Appendix to this brief.

STATEMENT

A. The Statutory Framework

1. In 1970, Congress enacted a comprehensive national program for combating air pollution. Clean Air Act Amendments

of 1970, Pub. L. No. 91-604, 84 Stat. 1676. Before 1970, the federal role had been limited, and "the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so." *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 64 (1975). The results of that approach, however, were "disappointing," and the 1970 Amendments "sharply increased federal authority and responsibility in the continuing effort to combat air pollution." *Id.* at 64. Although States continued to "have the primary responsibility for assuring air quality within the entire geographic area comprising such State" (§ 107(a) of the Clean Air Act, 84 Stat. 1678), they were now required to comply with specific federal criteria concerning the content of the air standards and the timetable for reaching them. *Train*, 421 U.S. at 64-65.

The basic regime for this new approach to air pollution was set forth in Sections 109 and 110 of the revised Clean Air Act. Congress charged the EPA Administrator with developing "national * * * ambient air quality standards" (NAAQS). § 109(a)(1), 84 Stat. 1679; 42 U.S.C. 7409(a)(1).[1] The NAAQS were of two types—primary (those necessary "to protect the public health" (84 Stat. 1680)) and secondary (those necessary "to protect the public welfare" (*ibid.*)). The EPA Administrator was required to propose NAAQS for known air pollutants within 30 days, and finalize the standards within 90 days thereafter. § 109(a)(1); 42 U.S.C. 7409(a)(1). The revised Act then required each State to develop and submit to EPA, within nine months after promulgation of the NAAQS, a state implementation plan (SIP) to achieve and maintain the NAAQS within the State. § 110(a)(1), 84 Stat. 1680; 42 U.S.C. 7410(a)(1). For its part, EPA was then required to determine, within four months of the date required for submission of original SIPs, whether a SIP met certain statutory requirements (§ 110(a)(2), 84 Stat. 1680; 42 U.S.C. 7410(a)(2)), including attainment of applicable primary NAAQS, "as expeditiously as practicable" but generally no later than three years

[1] "Ambient air" is "the statute's term for the outdoor air used by the general public." *Train* v. *Natural Resources Defense Council*, 421 U.S. at 65.

from the date of approval of a SIP (§ 110(a)(2)(A), 84 Stat. 1680; 42 U.S.C. 7410(a)(2)(A)).

The 1970 Amendments also set forth a procedure for SIP revisions. The Act requires EPA to approve revisions to existing SIPs if it determines that a revision meets the requirements applicable to original SIPs, and that it was adopted by the State after notice and public hearings. § 110(a)(3), 84 Stat. 1681; 42 U.S.C. 7410(a)(3)(A).[2] Unlike the provision for review of original SIPs, the provision for review of SIP revisions contains no express time limit. Moreover, the 1970 Amendments specified that, for purposes of the Act, "an applicable implementation plan" is a plan which has been approved by EPA. § 110(d), 84 Stat. 1682; 42 U.S.C. 7410(d).

The 1970 Amendments provided various enforcement mechanisms. The revised Act empowers EPA to order sources of pollutants to comply with "an applicable implementation plan" (§ 113(a), 84 Stat. 1686; 42 U.S.C. 7413(a)) and to seek injunctive relief against a source violating such a plan or violating an EPA order (§ 113(b), 84 Stat. 1687; 42 U.S.C. 7413(b)). The Amendments also prescribed criminal penalties for knowing violations of "applicable implementation plan[s]" and EPA orders (§ 113(c), 84 Stat. 1687; 42 U.S.C. 7413(c)). In addition, Congress authorized citizen suits for injunctions against violators, in the absence of government enforcement (§ 304, 84 Stat. 1706; currently codified at 42 U.S.C. 7604).

2. In 1977, Congress again significantly amended the Clean Air Act. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. The legislation was, at least in part, a response to widespread failure to meet the attainment deadlines in the 1970 Amendments. See, *e.g.*, S. Rep. No. 127, 95th Cong., 1st Sess. 12 (1977). See also *Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 847 (1984). Among other provisions, the 1977 Clean Air Act Amendments added to the Act the concept of a "nonattainment area"—an area where air quality falls short of NAAQS. § 171(2), 91 Stat. 746; 42

[2] Before 1974, this provision had been § 110(a)(3) of the Clean Air Act, rather than § 110(a)(3)(A). See Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, § 4(a), 88 Stat. 256.

U.S.C. 7501(2). The Amendments required each State containing a nonattainment area to prepare and secure EPA approval of a new SIP by July 1, 1979. §§ 110(a)(2)(I), 172(b), 91 Stat. 694, 746; 42 U.S.C. 7410(a)(2)(I), 7502(b). The deadline for attainment of the primary NAAQS in a nonattainment area was extended to December 31, 1982. § 172(a)(1), 91 Stat. 746; 42 U.S.C. 7502(a)(1). Further extensions were permitted for "photochemical oxidants" (ozone) and carbon monoxide, but only if the State demonstrated that attainment was not possible by 1982, despite the implementation of all reasonably available measures, and that attainment would be achieved "as expeditiously as practicable but not later than December 31, 1987." § 172(a)(2), 91 Stat. 746-747; 42 U.S.C. 7502(a)(2).[3] The nonattainment area SIPs, moreover, were required to contain specific provisions designed to achieve NAAQS as expeditiously as possible. See *Chevron*, 467 U.S. at 849. To this end, the revised Act required that the plan revisions must "provide for the implementation of all reasonably available control measures as expeditiously as practicable" and require, in the interim, "reasonable further progress" toward reductions in emissions. § 172(b)(2)-(3), 91 Stat. 747; 42 U.S.C. 7502(b)(2)-(3).

The 1977 Amendments also strengthened the Act's enforcement provisions. Congress authorized EPA to seek civil penalties; the Administrator could now bring an action in district court for civil penalties of up to $25,000 per day for violations of various provisions of the Act, including violations of an "applicable implementation plan." § 113(b), 91 Stat. 704; 42 U.S.C. 7413(b). In determining the amount of a civil penalty, moreover, the district court is directed to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." *Ibid.* Congress also gave the EPA additional authority to impose administrative noncompliance penalties; the Administrator could now assess administratively a noncompliance penalty against any "major stationary source"

[3] Petitioner's statement that "[f]or ozone the deadline is December 31, 1987" (Br. 4 n.1) is thus, at best, an incomplete statement of the pertinent statutory provision.

in violation of SIP emission limits. § 120, 91 Stat. 715-719; 42 U.S.C. 7420.[4] The penalty begins to accrue when EPA issues a Notice of Noncompliance (§ 120(d)(3)(C), 91 Stat. 718; 42 U.S.C. 7420(d)(3)(C)), and is intended to remove the economic benefit of delayed compliance and place polluters on the same economic footing as those who had limited their emissions through increased anti-pollution expenditures. § 120(d)(2)(A), 91 Stat. 718; 42 U.S.C. 7420(d)(2)(A). See also H.R. Rep. No. 294, 95th Cong., 1st Sess. 72 (1977).

B. The Proceedings In This Case

1. The entire Commonwealth of Massachusetts is a nonattainment area for the NAAQS regarding ozone. See 40 C.F.R. 81.322; J.A. 95. In 1980, EPA approved Massachusetts' proposed nonattainment area SIP. This SIP required painting operations at automobile assembly plants to meet increasingly stringent limits on emissions of volatile organic compounds (VOCs), which are substances that react with other chemicals in the atmosphere to form ozone.[5] Full compliance was required by December 31, 1985. Petitioner's plant in Framingham, Massachusetts is the only automobile assembly plant in the State. Pet. App. 6a; J.A. 29.

[4] A "major stationary source" is "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant." 42 U.S.C. 7602(j).

[5] The D.C. Circuit has described the effects of ozone:

> Ozone is the primary cause of the ill effects associated with smog, of which it usually comprises 65-100%. At certain concentration levels, ozone irritates the respiratory system and causes coughing, wheezing, chest tightness, and headaches. Due to its irritating nature, ozone can aggravate asthma, bronchitis, and emphysema. Some studies indicate that chronic exposure to fairly low levels of ozone may reduce resistance to infection and alter blood chemistry or chromosome structure. Ozone can destroy vegetation, reduce crop yield, and damage exposed materials by causing cracking, fading and weathering.

American Petroleum Institute v. *Costle*, 665 F.2d 1176,1181 (D.C. Cir. 1981), cert. denied, 455 U.S. 1034 (1982). See also *Illinois State Chamber of Commerce* v. *EPA*, 775 F.2d 1141, 1143 (7th Cir. 1985) ("Ozone is a significant component of the health-endangering smog that is one product of modern industry and transportation").

2. a. On October 20, 1981, EPA published a policy statement discussing the automobile industry's development of new technologies for reducing VOC emissions, including conversion from lacquer paints to the basecoat/clearcoat process (BC/CC). 46 Fed. Reg. 51,386-51,388; J.A. 30-37. EPA announced that it would entertain proposed SIP revisions intended to allow automakers to install new technology; it would extend the date for compliance until 1986, with some plants requiring until 1987 to convert. J.A. 33-34. EPA cautioned, however, that SIP revisions would need to assure continued compliance with Sections 110 and 172 (J.A. 30); Section 172 requires, among other things, "the implementation of all reasonably available control technology as expeditiously as practicable" and "reasonable further progress" toward attainment "in the interim." § 172(b)(2)-(3); 42 U.S.C. 7502(b)(2), (3).[6]

b. Within ten days of EPA's policy statement, petitioner submitted requests consistent with the policy statement for three of its assembly plants in other States; it did not, however, submit such a request for its Framingham plant. Pet. App. 6a. More than three years later, in November 1984, petitioner requested that the State extend the December 31, 1985, compliance date by two years (to December 31, 1987) to give petitioner additional time to install emission controls on its lacquer coating lines. J.A. 38-40. The State did not, however, submit the request as a SIP revision to EPA.

Eight months later, in June 1985, petitioner changed its plans. At this point—six months before the ozone emission compliance deadline that had been in effect in Massachusetts for almost five years—petitioner proposed converting its Framingham plant to the basecoat/clearcoat process. It requested a delay of the SIP standard until the end of 1987 (the same date that it had requested for its earlier emission control proposal). J.A. 41-45.

[6] EPA also emphasized that the revisions would "need to be evaluated in light of their impact on the overall plan and the individual elements, including emission reductions necessary to demonstrate reasonable further progress toward attainment of standards." J.A. 31-32.

c. Massachusetts provided public notice and held a hearing on December 16, 1985, regarding petitioner's request for an extension of the SIP compliance deadline. At this hearing, an EPA representative expressed reservations about the proposed extension because, among other problems, the proposal made no attempt to limit emissions during the extension period. J.A. 61-62. On December 30, 1985, one day before the final compliance deadline in the SIP that had been in place since October 1980, Massachusetts submitted to EPA a proposed SIP revision extending petitioner's compliance date for ozone emissions on automobile coating lines to August 31, 1987. J.A. 50-74; Pet. App. 6a-7a.

3. a. EPA's Region I office began reviewing the proposed SIP revision. At the same time, EPA, the Commonwealth, and petitioner also undertook negotiations in an attempt to resolve petitioner's noncompliance with the existing SIP by means of a Delayed Compliance Order under Section 113(d) of the Act (42 U.S.C. 7413(d)). Pet. App. 7a. Such an Order would have allowed an extension of the compliance date while requiring an enforceable schedule of steps toward compliance and protection from unnecessary emissions during the interim, neither of which was required by Massachusetts' proposed SIP revison.

b. On May 30, 1986, five months after its submission of the proposed SIP revision, Massachusetts requested that EPA delay action on the SIP revision until June 20, 1986, to allow negotiations to continue on a Delayed Compliance Order, which the Commonwealth considered a better way to resolve the matter. J.A. 89-90. Shortly after that period, on July 2, 1986, EPA Region I sent a draft proposal to disapprove the SIP revision to EPA Headquarters. J.A. 88.

c. On August 14, 1986, EPA sent petitioner a notice of violation. The notice informed petitioner that it was in violation of the applicable SIP. J.A. 75-82. EPA pointed to data establishing that, from January 1, 1986 to June 30, 1986, the VOC content in petitioner's operations at the Framingham plant considerably exceeded the SIP's emission limits. J.A. 79.[7]

[7] EPA pointed out that the SIP limit for topcoating was 2.8 pounds of VOC per gallon of coating (excluding water) and that petitioner had used top-

EPA's cover letter noted the ongoing negotiations between EPA, the State, and petitioner regarding a Delayed Compliance Order, but warned that, if no agreement was reached in 30 days, EPA would "decide which other enforcement options to pursue under Sections 113 and 120 of the Clean Air Act." J.A. 75-76. EPA urged petitioner to confer with the Agency and "discuss the most expeditious method * * * to come into compliance with the applicable SIP." J.A. 76.

d. The negotiations regarding the Delayed Compliance Order did not bear fruit, and the draft proposal to disapprove the SIP revision, which had been sent on July 2, 1986, was accordingly reviewed by EPA Headquarters. Pursuant to Executive Order 12291, it was also submitted to the Office of Management and Budget (OMB). J.A. 96. On December 1, 1986, EPA's notice of proposed disapproval was published in the Federal Register. 51 Fed. Reg. 43,394; J.A. 91-96. In the Notice, EPA pointed out (J.A. 93-95) that the proposed SIP revision failed to meet several of the criteria for deferral established in EPA's 1981 policy statement, and in particular failed to require the implementation of reasonably available control technology as expeditiously as practicable, as required by the Act (§ 172(b)(2), (3); 42 U.S.C. 7502(b)(2), (3)).

e. On June 30, 1987, following receipt of public comment on the proposed SIP revision, Region I transmitted to EPA Headquarters a draft of a final decision disapproving the proposed SIP revision. J.A. 88. This draft was reviewed at EPA Headquarters and again at OMB. 53 Fed. Reg. 36,014. On May 5, 1988, petitioner submitted 405 pages of comments and attachments regarding the proposed disapproval, to which EPA responded in detail. See 53 Fed. Reg. 36,012 n.1; *General Motors* v. *Reilly*, No. 88-2123 (1st Cir.) (C.A. Dkt. Nos. 69-111). On September 4, 1988, EPA issued a final decision disapproving the proposed SIP revision; the decision was

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coatings with an average content of 5.02 pounds of VOC per gallon of coating (excluding water); EPA also pointed out that the SIP limit for final repair coatings was 4.8 pounds of VOC per gallon of coating (excluding water), and that petitioner had used final repair coatings with an average of 6.18 pounds of VOC per gallon of coating (excluding water). J.A. 79.

published in the Federal Register on September 16, 1988. 53 Fed. Reg. 36,011; see also Pet. App. 7a-8a.[8]

2. On August 17, 1987, the United States filed a civil enforcement action against petitioner under Section 113 of the Act (42 U.S.C. 7413). J.A. 7-13. The complaint alleged continuous violations by petitioner—beginning on January 1, 1986—of the VOC emission standards of the existing SIP. J.A. 11. EPA had sent a notice of violation to petitioner almost exactly one year before filing the complaint. EPA had published (some eight months earlier) its proposed disapproval of the SIP revision in the Federal Register; however, EPA Headquarters had not yet acted on Region I's draft final decision of disapproval.

On petitioner's motion, the district court dismissed the action in its entirety. The district court construed Section 110(a)(3) to impose a four-month time limit on EPA's review of a SIP revision, and held that, because it exceeded that deadline, EPA was barred from enforcing the existing SIP for any violations that occurred before final agency action on the proposed SIP revision. J.A. 119-125.

3. The court of appeals reversed and remanded for further consideration. The court first agreed with the district court that the four-month deadline on EPA's review of original SIPs should also apply to the review of SIP revisions. Although it found the question "admittedly * * * a close one" (Pet. App. 11a), the court concluded that Congress would not have wanted the States' policy choices "to be held hostage to the EPA's schedule." *Id.* at 12a. The court emphasized that, "by imposing a four-month deadline on the EPA," it avoided "the possibility that the Agency would have assigned a lower priority to SIP revisions from First Circuit states than to those from states in circuits that had imposed a deadline." *Ibid.*

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[8] On November 11, 1988, petitioner filed a petition for review of EPA's denial of the proposed SIP revision in the court of appeals. *General Motors* v. *Reilly*, No. 88-2123 (1st Cir.). That action has been stayed pending EPA action on petitioner's request for reconsideration by the agency, and pending decision in this case.

The court of appeals disagreed, however, with the Fifth Circuit's holding in *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (1987), that EPA is barred from enforcing an existing SIP for the interval between the end of the four-month period and the time when the agency acts on the proposed SIP revision. The court reasoned that an enforcement bar is too drastic a remedy for agency delay, especially since it penalizes the public's interest in clean air. Pet. App. 14a. The court also found it likely that EPA would frequently need longer than four months to issue a considered ruling, and would therefore miss the deadline even with the incentive of an enforcement bar. *Id.* at 13a-14a. At the same time, the court rejected the D.C. Circuit's alternative approach in *Duquesne Light Co.* v. *EPA*, 698 F.2d 456 (1983). As the court explained, the D.C. Circuit had held that, if a SIP revision is ultimately rejected, "penalties may be assessed retroactively, with interest, for the entire period after the deadline." Pet. App. 13a. Seeking to "steer a middle course between these two extremes" (Pet. App. 14a), the court concluded that the appropriate remedies for agency inaction are those provided by the Clean Air Act itself: (1) a suit to compel Agency action under Section 304(a)(2) (42 U.S.C. 7604(a)(2)), or (2) a request pursuant to Section 113(b) (42 U.S.C. 7413(b)) for reduction or elimination of penalties during any period in which unreasonable agency delay resulted in prejudice. *Id.* at 14a-15a.

With respect to the enforcement action in this case, the second remedy was applicable. The court noted that Section 113(b) directs district courts, in assessing any penalties, to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." Pet. App. 15a. Thus, the district court could "decline to award penalties for * * * unwarranted delay." *Ibid.* The court of appeals noted, "if on remand in this case, the district court finds that [petitioner] was prejudiced by the Agency's lengthy review and that the delay was not justified or that some portion of the delay was not justified, it may reduce the penalties in a manner it sees fit." *Ibid.* The court thus remanded to permit the district court to consider

petitioner's claims regarding "the equities of this case" (*id.* at 17a) and for assessment of appropriate penalties, if any.[9]

SUMMARY OF ARGUMENT

Section 113 of the Clean Air Act expressly authorizes EPA to bring actions for injunctive relief and civil penalties against any person in violation of "any requirement of an applicable implementation plan." 42 U.S.C. 7413(a)(1). Petitioner seeks a court-imposed rule that would limit this explicit grant of authority by barring enforcement whenever a proposed revision to the applicable SIP has been submitted to EPA and the agency has not taken final action on the proposal within four months. The court of appeals properly rejected this attempt to impose a limit which Congress never prescribed on EPA's enforcement authority.

1. Petitioner's argument begins with the flawed premise that the four-month limit for review of original SIPs under Section 110(a)(2) applies to review of proposed SIP revisions under Section 110(a)(3)(A). The language of the statute does not support this interpetation. Section 110(a)(3)(A) requires that the proposed revision "meet[ ] the requirements" of an original SIP (42 U.S.C. 7410(a)(3)(A)); it does not require that EPA act on a proposed revision within four months. The four-month time limit for review of original SIPs was part of an elaborate timetable established in 1970 to ensure that emission limitations, many of which were already formulated, could be put into place with maximum speed. There is no evidence that Congress expected or required equal haste for SIP revision proposals. The latter frequently involve relaxation or delay of strict emission

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[9] The Sixth Circuit has now agreed with the First Circuit's analysis in this case, and has also rejected the *American Cyanamid* enforcement bar. See *United States* v. *Alcan Foil Products*, 889 F.2d 1513 (6th Cir. 1989), petition for cert. pending, No. 89-1104. Both this case and *Alcan Foil* arose in the context of Section 113 enforcement proceedings; *Duquesne Light* and *American Cyanamid* arose in the context of Section 120 administrative assessments. Neither the First Circuit nor the Sixth Circuit rested its decision on that distinction. See Pet. App. 16a & n.4; 889 F.2d at 1518.

control requirements. These are, obviously, complicated issues requiring careful scrutiny by the agency. Rather than the four-month time limit, the statutory standard for agency timeliness in acting on SIP revision proposals is the Administrative Procedure Act's standard of reasonableness (5 U.S.C. 555 and 706(1)). And, in view of the applicable administrative and statutory requirements, as well as the nature and complexity of the issues, review of SIP revisions for longer than four months is often entirely reasonable.

2. Even if a four-month time limit obtains for review of SIP revisions, neither the statute nor the legislative history reveals any intent to eviscerate EPA's authority, after expiration of that period, to enforce the statute. Section 113 clearly states that EPA may bring an action to enforce the "applicable implementation plan" (42 U.S.C. 7413(b)(2)); this Court in *Train* v. *Natural Resources Defense Council,* 421 U.S. 60, 92 (1975), and many lower courts, have made clear that the existing SIP is the applicable plan until both the State and EPA have approved a revision. See § 110(d); 42 U.S.C. 7410(d). Accordingly, three Circuits—the First, Sixth, and D.C. Circuits—have now concluded that EPA does not lose authority to enforce the existing SIP even if a SIP revision has been pending for more than four months.

The Fifth Circuit's contrary conclusion in *American Cyanamid* is unsupported by statutory language or legislative history, and conflicts with this Court's decision in *Brock* v. *Pierce County,* 476 U.S. 253 (1986). *Brock* makes clear that courts should not assume that Congress intends agencies to lose their power to act when they fail to meet statutory deadlines, particularly when there are "less drastic" remedies available. As the court below found, less drastic remedies are available to deal with untimely agency action: either a suit by the State or the source to compel agency action, or a request by the source for a reduction of civil penalties where agency delay has led to prejudice.

Petitioner's asserted policy reasons for an enforcement bar cannot override the statutory language and are, in any event, unpersuasive. The States' role under the Clean Air Act is adequately protected by the remedies specifically provided by Congress to address agency delay; there is no need to infer an additional remedy not provided by statute and no warrant for doing so. Indeed, barring the United States from enforcing the applicable SIP would thwart the clear congressional intent to remove incentives for delaying compliance with the strict deadlines of the Act. What is more, a judicially-created bar would also disserve the States' and the public's interest in cleaner air.

Nor is an enforcement bar needed to address the possibility that an enforcement action might undermine even-handed consideration of a proposed SIP revision. That speculative possibility does not stem from agency delay, but from Congress's decision to assign both enforcement and SIP review responsibilities to the same agency. Even if a decision on a SIP revision were to be improperly influenced by the pendency of an enforcement action, Congress provided an adequate remedy in the form of direct review of the SIP denial in the courts of appeals, a remedy which petitioner has invoked in this case. Any possible prejudice suffered by a defendant in an enforcement action by reason of EPA delay in reviewing a SIP revision can be addressed by the court in assessing penalties. The argument that an enforcement bar is needed to punish the agency for delay also fails, because it is the public, not EPA, that would be hurt if applicable SIPs could not be enforced.

Petitioner's policy arguments not only fail to persuade, they misconceive the role of the courts in interpreting statutes. Where, as here, Congress has conferred upon an agency an explicit mandate to enforce "applicable implementation plans," it is not the appropriate province of the judiciary to carve out exceptions in order to create policy-based incentives for administrative management.

ARGUMENT

I. THE FOUR-MONTH LIMIT FOR REVIEW OF ORIGINAL SIPS UNDER SECTION 110(a)(2) DOES NOT APPLY TO REVIEW OF PROPOSED SIP REVISIONS UNDER SECTION 110(a)(3)(A)

As the court of appeals recognized, Section 110(a)(3)(A), which governs review of SIP revisions, does not "contain language explicitly imposing a four-month deadline on the Agency." Pet. App. 5a. Stating that the question is "a close one" (*id.* at 11a), that it is "unlikely * * * that Congress * * * intended for the states' legitimate policy choices to be held hostage to the EPA's schedule" (*id.* at 12a), and that the States in the First Circuit thus would not be disadvantaged (*ibid.*), the court agreed with the rule adopted in other Circuits applying the four-month time limit for consideration of original SIPs in Section 110(a)(2) (42 U.S.C. 7410(a)(2)) to EPA's consideration of SIP revisions in Section 110(a)(3)(A) (42 U.S.C. 7410(a)(3)(A)).[10] In so concluding, the court erred. In light of the fact that the statutory language does not provide a four-month deadline and the further fact that in the Clean Air Act, Congress was explicit about other deadlines, the application of the Section 110(a)(2) deadline for initial agency approval of SIPs as a Section 110(a)(3)(A) deadline for subsequent agency review of SIP revisions is unwarranted. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (" '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' ").[11]

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[10] See Pet. App. 12a (citing *American Cyanamid*, 810 F.2d at 495; *Council of Commuter Organizations* v. *Thomas*, 799 F.2d 879, 888 (2d Cir. 1986); *Council of Commuter Organizations* v. *Gorsuch*, 683 F.2d 648, 651 n.1 (2d Cir. 1982); and *Duquesne Light Co.* v. *EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983)). In *United States* v. *Alcan Foil Products*, *supra*, the Sixth Circuit also concluded that a four-month limit applies to SIP revisions. 889 F.2d at 1517-1518.

[11] Contrary to petitioner's contention (Br. 12 n.13), the question of the applicability of a four-month deadline to review of SIP revisions is properly before this Court. The non-applicability of such a deadline is an alternative ground for affirming the judgment of the court of appeals, which reversed the dismissal of the enforcement action and remanded for consideration of penalties. The "prevailing party" is "of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 475 n.20 (1979). See also *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984); *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977). In this case, the issue has been not only properly raised below, but explicitly addressed by both the district court and the court of appeals. See J.A. 122-125; Pet. App. 9a-12a.

1. As always, " 'the starting point for interpreting a statute is the language of the statute itself.' " *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 308 (1989). Indeed, the text itself is the critical element of the interpretive inquiry, since it is the text itself which is law. In this case, the pertinent textual analysis is of Section 110(a)(2), which governs original SIP submissions and explicitly imposes a four-month deadline on agency review, and Section 110(a)(3)(A), which governs SIP revisions and imposes no such deadline.

Section 110(a)(2) contains two sentences. The first provides, "The Administrator shall, within four months after the date required for submission of a plan under paragraph (1) [§ 110(a)(1); 42 U.S.C. 7410(a)(1)], approve or disapprove such plan, or any portion thereof." The four-month review period thus begins with the date specified in Section 110(a)(1)—"nine months after the promulgation of a national primary ambient air quality standard" or "a national ambient air quality secondary standard." 42 U.S.C. 7410(a)(1). Both Section 110(a)(1) and Section 110(a)(2) were part of an integrated timetable established in 1970 to ensure that delays in formulating the original SIPs did not interfere with the 1975 attainment deadline.[12]

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[12] This original schedule included (1) proposed NAAQS "within 30 days after December 31, 1970" (§ 109(a)(1)(A); 42 U.S.C. 7409(a)(1)(A)); (2) final NAAQS "no later than 90 days after initial publication of such proposed standards" (§ 109(a)(1)(B); 42 U.S.C. 7409(a)(1)(B)); (3) original SIP submissions "within nine months after the promulgation" of NAAQS (§ 110(a)(1); 42 U.S.C. 7410(a)(1)); (4) EPA action on SIP submissions within four months (§ 110(a)(2); 42 U.S.C. 7410(a)(2)); and (5) attainment of the primary NAAQS "as expeditiously as practicable but * * * in no case later than three years"

The second sentence of Section 110(a)(2) provides: "The Administrator shall approve such [state implementation] plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that" specified requirements are satisfied, as set forth in Section 110(a)(2)(A)-(K). These requirements are the heart of the federal SIP review process, establishing the minimum standards for all state plans.

Section 110(a)(3)(A), which governs SIP revisions, provides in its entirety, that

> [t]he Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) [§ 110(a)(2); 42 U.S.C. 7410(a)(2)] and has been adopted by the State after reasonable notice and public hearings.

The phrasing of this provision precisely parallels the second sentence of Section 110(a)(2). Both refer to the substantive standards that must be satisfied before a plan or revision is approved, and to the requirement that the State provide notice and public hearing. But nothing in Section 110(a)(3)(A) can properly be read as referring to or incorporating the first sentence of Section 110(a)(2), which requires EPA to act within four months "after the date required for submission of a plan under" § 110(a)(1).[13] Indeed, the language of the Section 110(a)(2) deadline—"within four months after the date required for submission of a plan"—makes no sense in the context of a SIP revision because revisions are not "required." Although petitioner reads Section 110(a)(3)(A) as if it said that "the Administrator shall approve or disapprove any revision no later than four months after its submission," the statute in fact contains no such language.[14]

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from the date of approval of the original SIP (§ 110(a)(2)(A); 42 U.S.C. 7410(a)(2)(A)).

[13] The "it" in § 110(a)(3)(A), which must "meet[ ] the requirements of paragraph (2)," plainly refers to the SIP revision, not to the Administrator.

[14] Significantly, the very next provision of the Act, relating to certain SIP revisions for fuel burning stationary sources, contains just such language. See

2. Congress in 1970 desired to put the basic framework of the Act—the NAAQS and the original state plans implementing them—in place as quickly as possible.[15] The four-month deadline for approval of original SIPs was part of a scheme enacted by Congress to get air pollution controls in place swiftly.[16]

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§ 110(a)(3)(B); 42 U.S.C. 7410(a)(3)(B) ("The Administrator shall approve or disapprove any revision no later than three months after its submission."). Clearly, Congress knew how to impose time limits on EPA processing of SIP revisions when it wanted to do so. The three-month limit in Section 110(a)(3)(B) is practicable because a proposed SIP revision under that Section can be submitted only *after* the Administrator has determined that the SIP can be revised "without interfering with the attainment and maintenance of any national ambient air quality standard," and has so notified the State. Hence, the difficult determination of whether NAAQS will be preserved will already have been made. Indeed, Section 110(a)(3)(B) requires the Administrator to make *that* determination—whether state plans are capable of revision without interfering with the attainment of NAAQS—not within a specified three-month period, but merely "[a]s soon as practicable."

Other examples of explicit deadlines in the Clean Air Act are the deadlines for imposition of a federal implementation plan (§ 110(c)(1); 42 U.S.C. 7410(c)(1)) and review of a State-issued delayed compliance order (§ 113(d); 42 U.S.C. 7413(d)).

[15] The legislative history reflects this sense of urgency. See, *e.g.*, Congressional Research Service, 1 *A Legislative History of the Clean Air Amendments of 1970*, at 124-125 (Comm. Print 1974) (remarks of Senator Muskie on consideration of the conference report) ("Let me now review briefly where we were in September • • •. Unless we recognized the crisis and generated a sense of urgency, national lead times to find and apply controls [and] measures could melt away without any chance for a rational solution to the air pollution problem. • • • [N]ational air quality goals • • • had to be achieved within specific time frames • • •."). See also *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256 (1976) ("[T]he 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution.").

[16] See S. Rep. No. 1196, 91st Cong., 2d Sess. 14 (1970) ("In order to insure achievement of air quality necessary to protect the health of persons within the period specified in the bill, time constraints would be placed on the Secretary's review and approval authority. • • • The bill would provide that the Secretary must approve or reject any implementation plan submitted by a State within four months of the date required for its submission."). In that version of the legislation, the Secretary of Health, Education, and Welfare, who had previously been responsible for federal air pollution control efforts, was given responsibility for reviewing SIP submissions. See *id.* at 52.

Meeting short deadlines for these initial steps was considered possible in part because many States had already developed ambient air standards for metropolitan areas, some of those standards had already received federal approval, and various implementation plans were already in preparation or had been completed under earlier versions of the Clean Air Act.[17]

There is no evidence, however, that Congress expected the same short deadlines to apply once the original SIPs were in place to protect public health. Indeed, the SIP revision authority in Section 110(a)(3) was enacted virtually without comment. The logical inference is that, once the protective framework of original SIPs was in place, the States and EPA would not be expected to maintain the same hectic pace on matters like SIP revisions, which often, as in the case here, involve relaxation or delay of strict emission control requirements.

3. Petitioner contends (Br. 13 n.14) that the Court should use Section 110(g) (42 U.S.C. 7410(g)) as an aid to construction of Sections 110(a)(2) and 110(a)(3)(A). This provision, added by the 1977 Amendments, permits the Governor of a State to issue a four-month suspension of portions of a SIP where the State has submitted a SIP revision "which the Administrator has not approved or disapproved under this section within the required four month period," and which is necessary to prevent substantial unemployment resulting from a plant closing. 42 U.S.C. 7410(g). Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 107(b), 91 Stat. 692-693. By its terms, this provision does not in any way amend Section 110(a)(2) or Section 110(a)(3)(A). Moreover, there is no legislative history that suggests, and no reason to believe, that the new provision was designed to clarify the relationship between Sections 110(a)(2) and 110(a)(3)(A), or to impose a new deadline on SIP revision processing.

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[17] See CRS, 2 *A Legislative History of the Clean Air Act Amendments of 1970*, at 1036-1038 (Comm. Print 1974) (testimony of Charles C. Johnson, Administrator, Environmental Health Services, Department of Health, Education, and Welfare). The 1970 Amendments specifically provided that any pre-enactment state implementation plan could be approved and remain in effect if consistent with the Amendments. See 84 Stat. 1713; 42 U.S.C. 7410 note.

Petitioner's position is apparently that reference in the new provision to "the required four month period" is an indication that Congress, in 1977, interpreted the 1970 Amendments as having imposed such a time limit on SIP revision determinations. Even if there were any evidence that Congress was interpreting the 1970 Amendments, the views of the 1977 Congress would obviously not be probative of the legislative intent in 1970.[18] But there is no such evidence. The reference to the "required four month period" was inserted by the Conference Committee, and the legislative history of the 1977 Amendments does not explain its meaning. See H.R. Conf. Rep. 564, 95th Cong., 1st Sess. 125 (1977). The phrase may well be a residual reference to the four-month period within which the Administrator was required to approve or disapprove a "temporary emergency suspension" under the House version of the legislation,[19] and Section 110(g) is most reasonably interpreted as contemplating a four-month period for EPA review of such emergency SIP revisions. That interpretation reasonably reconciles all pertinent textual provisions, and is not precluded by any language of the statute or expression of congressional intent. Indeed, the focus of the drafters of subsection (g) was on situations of economic emergency; there is simply no evidence that they intended to speak to the day-to-day processing of routine requests for extensions or variances.

4. Even without a four-month deadline, EPA remains subject to statutory requirements of timeliness. The Administrative

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[18] See *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 63 n.4 (1987) ("Respondents point to provisions in the 1987 Act and statements in its legislative history • • •. The conclusions of the 99th Congress, however, are hardly probative of the intent of the 92d Congress."); *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958) ("At most, the 1918 amendment is merely an expression of how the 1918 Congress interpreted a statute passed by another Congress more than a half century before. • • • [S]uch interpretation has very little, if any, significance").

[19] See H.R. 6161, 95th Cong., 1st Sess. § 115 (1977) (reprinted in CRS, 4 *A Legislative History of the Clean Air Act Amendments of 1977*, at 2324 (Comm. Print 1978)).

Procedure Act requires agencies to conclude matters "within a reasonable time" (5 U.S.C. 555) and provides a remedy for agency action "unreasonably delayed" (5 U.S.C. 706(1)). See *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 220 n.14 (1980). Measured by this statutory requirement, EPA review of SIP revision proposals for longer than four months is—in the usual case—not unreasonable.

In most instances, there is no realistic possibility that EPA can appropriately take final action on proposed SIP revisions within four months. The Administrative Procedure Act's (APA) requirement for notice and public comment alone is likely to use up most or all of the allotted period. See *Buckeye Power, Inc.* v. *EPA*, 481 F.2d 162, 170-171 (6th Cir. 1973) (APA notice and comment requirements apply to EPA decision on SIPs), cert. denied, 425 U.S. 934 (1976); *United States Steel Corp.* v. *EPA*, 605 F.2d 283, 288 (7th Cir.) (public comment and response to comments can take several months), cert. denied, 444 U.S. 1035 (1979). Requests to extend the customary 30-day comment period are not unusual and are routinely granted. As befits the purposes served by public participation, additional comments during such an extension may considerably enhance the decisionmaking process. See, *e.g.*, *United States* v. *National Steel Corp.*, 767 F.2d 1176, 1181 (6th Cir. 1985) (comment period extended and SIP revision rejected because additional comments established inaccuracies in methodology used to justify proposed revision). Moreover, the agency must "respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule." *Rodway* v. *Dep't of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975). In many cases, as here (53 Fed. Reg. 36,012 n.1 (1988)), comments are received after the close of the comment period, and considered and addressed by the Agency. To have any hope of meeting a four-month deadline, EPA would have to issue a proposed decision almost immediately after receipt of the SIP revision. That would hardly be conducive to reasoned decisionmaking, and indeed would subvert the important supervisory role that Congress intended EPA to

carry out. Nor would such precipitous action further the federal-state partnership embodied in the Act. In some cases, it makes more sense to negotiate with a State to bring about an approvable SIP revision, rather than deny an inadequate proposal outright. Additionally, a State may want EPA to hold a matter in abeyance. In this very case, for instance, the Commonwealth requested EPA to delay processing of the SIP revision while it attempted to negotiate a Delayed Compliance Order with petitioner. J.A. 89-90. If a strict four-month rule applied, EPA would have to reject even reasonable requests by States for staying its hand. There is no reason to believe that Congress would have intended to usher in such an implausible regime.

Several other factors likewise contribute to the time required for SIP revision review. Because the various States use widely different methodologies (see J. Bromberg, *Clean Air Act Handbook* 110-111 (1985)), primary review of SIP revisions is carried out by the regional offices of EPA which are familiar with the situation in each State. In many instances, however, SIP revision proposals will raise policy questions with nation-wide implications; hence, review by EPA Headquarters is also important. J.A. 98; see also *State Implementation Plan Processing Reform; Notice of Procedural Changes*, 54 Fed. Reg. 2214, 2215 (1989) (SIP Processing Reform). Disapprovals and partial approvals also must undergo Office of Management and Budget review under Executive Order 12,291, 46 Fed. Reg. 13,193 (1981), before being published as final decisions in the Federal Register. See SIP Processing Reform, 54 Fed. Reg. 2215 (1989). This OMB review can take several months.[20]

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[20] See Letter from Joseph A. Cannon, EPA Associate Administrator, Policy and Resource Management to Hon. Sam. B. Hall, Chairman, House Subcommittee on Administrative Law and Governmental Relations (May 26, 1983), reprinted in *Regulatory Reform Act: Hearings Before the Subcomm. on Administration Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 1561-1562 (1983).

Furthermore, the analysis required to evaluate the merits of a proposed SIP revision is frequently complex and resource intensive. For example, a typical SIP revision for a single source of volatile organic compounds in an ozone nonattainment area (the case here) requires EPA to compare the source's proposed control technology with control technology of which EPA is aware for other similar sources, and determine whether the compliance schedule is as expeditious as practicable in light of the proposed technology, alternative technologies, and special circumstances at the source. 42 U.S.C. 7502(b)(2); J.A. 84-85. EPA must determine whether the proposed revision will assure that the State will continue to make "reasonable further progress" each year that is "sufficient * * * to provide for attainment of the applicable national ambient air quality standard by the date required." 42 U.S.C. 7501(1), 7502(b)(3). This requires an analysis of the State's reported reductions in emissions and the effect the proposed revision will have on continued reductions, which typically requires complex mathematical modeling. J.A. 84-85.[21]

Contrary to petitioner's repeated suggestion that EPA has been either indifferent or willfully dilatory with regard to SIP revision review,[22] the issue of delays in SIP revision review has been a subject of continuing concern to the Agency. Between 1983 and 1989, the Agency processed more than 1600 SIP-related actions—an average of almost 350 per year. SIP Processing Reform, 54 Fed. Reg. 2215. In 1985, the Agency issued internal guidelines setting a 14-month timetable for action on most proposed SIP revisions. Office of Air Quality Planning and Standards, EPA, *Guidelines on Processing SIP Revisions (And*

[21] The requirements that SIPs in nonattainment areas provide for the use of "reasonably available control technology" (RACT) to reduce emissions and that they provide for "reasonable further progress" in controlling emissions during the interim before compliance (42 U.S.C. 7502(b)(3)) were added by the 1977 Amendments; they require EPA to make a more detailed inquiry into a State's choice of emission limitations. See, *e.g.*, *Michigan* v. *Thomas*, 805 F.2d 176, 184-185 (6th Cir. 1986).

[22] See, *e.g.*, Br. 11, 12, 14, 18, 22.

111(d) Plans) (1985) (J.A. 103-111). The Agency concluded that this guideline represented a reasonable accommodation of the public interest in (and the Agency's statutory responsibility for) careful review of SIP revision proposals, as well as States' and sources' interest in expeditious review.[23] Because the Agency remained concerned about continuing problems of delays, however, EPA announced in 1989 extensive changes in SIP revision review to expedite Agency review and achieve better compliance with the Agency's own timeliness goals. See SIP Processing Reform, 54 Fed. Reg. 2214-2226 (1989). After notice and comment on these changes, EPA has now issued a final rule and revised guidelines regarding its SIP review procedures. The revised procedures recognize that SIP revision proposals vary widely, and set forth a sliding scale of three months to fourteen months for Agency review of most SIP revisions, depending on their nature and complexity (which in some instances may necessitate a period of longer than fourteen months). See 55 Fed. Reg. 5824, 5826-5828 (1990).[24]

It may be that, despite these Agency efforts, particular SIP revision reviews have been subject to unwarranted delay, or will be in the future. The pertinent statutory measure, however, is the APA's standard of reasonableness, not a four-month

[23] Cf. *United Steelworkers of America* v. *Rubber Manufacturers Ass'n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (accepting Occupational Safety and Health Administration's proposed 14-month schedule for completing rulemaking because agency "obviously cannot know at present how many comments it will receive or the nature of those comments," and because, given the need for careful consideration of complex issues, "judicial imposition of an overly hasty timetable at this stage would ill serve the public interest").

[24] In its condemnation of EPA, petitioner misstates a finding in an internal Agency audit. According to petitioner, the Agency audit found that the average time for SIP revision review is 30 months. Br. 29. In fact, however, the audit found that 30 months is the average time only for review of SIP revisions in which a disapproval is contemplated; those are, of course, the revisions that require the most time and are the most contested. See EPA, *Report of Audit, Review of EPA's Process for Approving/Disapproving State Implementation Plans and Revisions*, EIK•8-11-0045-9100210 (March 1985) 20-21 (analyzing length of time for "pending disapprovals").

deadline that is not to be found in the language of Section 110(a)(3)(A).[25]

II. EVEN IF THERE IS A FOUR-MONTH TIME LIMIT FOR REVIEW OF SIP REVISION PROPOSALS, EPA IS NOT BARRED FROM ENFORCING THE TERMS OF AN EXISTING SIP ONCE THAT DEADLINE HAS PASSED

If (contrary to our view) the Section 110(a)(2) deadline does apply to Section 110(a)(3)(A) revisions, the court of appeals nonetheless correctly concluded that EPA's failure to meet the deadline should not lead to a bar of enforcement actions for violations of the original SIP until the Agency's final action on the proposed revision. A claim that a statute's enforcement should be barred because an agency has missed a deadline for regulatory action must be resolved by "examin[ing] carefully the statutory language and legislative history to determine whether Congress did indeed desire this somewhat incongruous result." *Brock* v. *Pierce County*, 476 U.S. 253, 258 (1986). Neither the statute nor the legislative history reveals any congressional intent to bar enforcement when EPA fails to act within a specified period; instead, as the court of appeals concluded, less drastic remedies to address problems of Agency delay are already provided by statute.

[25] Amici Golden West Refining Co., et al., contend (Br. 7 n.4) that "EPA acknowledged the four month limit applied to SIP revisions" in regulations implementing Section 120. What Golden West mistakenly refers to as "proposed regulations" was actually a final rule modifying EPA's Section 120 regulations in response to the D.C. Circuit's *Duquesne Light* decision. 50 Fed. Reg. 36,732 (1985). With respect to the four-month deadline, EPA merely repeated the holding of *Duquesne Light* and cited the decision. 50 Fed. Reg. 36,733 (1985). This recognition of a court decision obviously does not amount to an "acknowledge[ment]" or a concession. See *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 83 n.25 (1980). See also SIP Processing Reform, 54 Fed. Reg. 2215 n.1 (1989) (reiterating Agency view that four month deadline "does not apply to SIP revisions").

A. There Is No Support In The Language Or Legislative History Of The Clean Air Act For An Enforcement Bar

The language of the Clean Air Act plainly states that EPA may bring an action for penalties or injunctive relief whenever a person is in violation of any requirement of an "applicable implementation plan." § 113(b)(2); 42 U.S.C. 7413(b)(2).[26] Without question, the existing SIP remains the "applicable implementation plan" even after the State has submitted a proposed revision. See § 110(d); 42 U.S.C. 7410(d) ("For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under [§ 110(a); 42 U.S.C. 7410(a)] or promulgated under [§ 110(c); 42 U.S.C. 7410(c)] and which implements the requirements of this section.".[27] This Court has emphasized the continuing applicability of an existing SIP while a SIP revision proposal is pending:

> [A] polluter is subject to existing requirements until such time as he obtains a variance, and variances are not available under the revision authority until they have been approved by both the State and the [Environmental Protection] Agency. Should either entity determine that granting the variance would prevent attainment or maintenance of national air standards, the polluter is presumably within his rights in seeking judicial review. This litigation, however, is carried out on the polluter's time, not the public's, for during its pendency the original regulations remain in effect, and the polluter's failure to comply may subject him to a variety of enforcement procedures.

Train v. *Natural Resources Defense Council*, 421 U.S. 60, 92 (1975). The courts of appeals have similarly recognized that the approved SIP is the applicable implementation plan even after a SIP revision has been proposed.[28]

[26] EPA may bring the action 30 days after notice of a violation. If the EPA has, pursuant to 42 U.S.C. 7413(a)(2), assumed enforcement of a SIP from the State because of state enforcement failures, the 30-day period is not necessary. 42 U.S.C. 7413(b)(2).

[27] The reference to Section 110(c) is to situations in which, because of state failure to comply with SIP submission requirements, the Administrator promulgates a SIP on the State's behalf. See 42 U.S.C. 7410(c).

[28] See *Alcan Foil*, 889 F.2d at 1519 ("[A] proposed revision is exactly what its name implies – a proposal, and nothing more."); *Duquesne Light*, 698 F.2d

In *American Cyanamid*, the Fifth Circuit recognized that the proposed SIP revision does not displace the existing SIP as the applicable plan (810 F.2d at 495), but nevertheless concluded that EPA should be barred from enforcing the existing SIP if the Agency has not acted on a proposed revision within four months. That court decided for policy reasons that an enforcement bar was necessary to penalize EPA for "contumaciousness," to preserve the role of the States under the Act, and to assure even-handed consideration of SIP revision requests. 810 F.2d at 499-500. The court made virtually no attempt to ground its enforcement bar in a specific statutory provision, or in specific evidence of legislative history. And, in fact, there is no evidence that Congress either intended or provided such an enforcement bar. In carving an exception out of EPA's general statutory enforcement authority, the *American Cyanamid* rule is "contrary to what the statute says." [29]

Nothing in the statute qualifies EPA's authority to enforce the "applicable implementation plan" in this circumstance. Indeed, Congress enacted an explicit enforcement bar elsewhere in the statute[30] – a fact which further rebuts the notion that an implicit enforcement bar was somehow intended if EPA misses a deadline under Section 110(a)(3)(A). See *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 309 (1989) ("[W]e are not at liberty to create an exception where Congress has declined to do so."); *Russello* v. *United States*, 464 U.S. at 23. Furthermore, reading an enforcement bar into Section 110(a)(3)(A) would render superfluous the explicit and limited provision of Section 110(g) (42 U.S.C. 7410(g)), which Congress enacted in 1977 to address the situation in which a pending SIP revision has not been acted on by EPA and the State believes that the waiver is necessary to prevent substantial unemployment due to plant closings. In that Section, Congress has granted authority to a Governor to suspend the existing SIP after four months. As the court of appeals recognized (Pet. App. 18a n.6), there would have been no reason for Congress to add that Section if the existing SIP automatically became unenforceable at the end of that period.[31]

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at 471 (same); *United States* v. *Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1084 (3d Cir. 1987) (company is obliged to comply with existing compliance deadlines during pendency of SIP revision); *United States* v. *Ford Motor Co.*, 814 F.2d 1099, 1103 (6th Cir.) ("the original emission limit remains fully enforceable until a revision or variance is approved by both the State and EPA"), cert. denied, 484 U.S.C. 822 (1987); *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 511 F.2d 809, 812 (D.C. Cir. 1975) (proposed SIP revision has no legal effect until approved by EPA); *Natural Resources Defense Council* v. *EPA*, 478 F.2d 875, 886 (1st Cir. 1972) (same).

[29] D. Currie, *Air Pollution: Federal Law and Analysis* § 8.07 n.14 (Supp. 1989). See also 1 W. Rodgers, *Environmental Law: Air and Water* § 3.39 (Supp. 1988) (enforcement bar is a "limitation invented by *American Cyanamid*").

[30] Section 113(d)(10); 42 U.S.C. 7413(d)(10), contains an express enforcement bar when Delayed Compliance Orders are in effect: it provides that, during the period of the Order and where the source is in compliance with its terms, "no Federal enforcement action pursuant to this section and no action under section 7604 of this title [providing for citizen suits] shall be pursued against such owner or operator based upon noncompliance during the period the order is in effect with the requirements for the source covered by such order."

Section 113(d)(2); 42 U.S.C. 7413(d)(2), moreover, provides that a Delayed Compliance Order issued by a State to a "source other than a major stationary source" is effective until the Administrator disapproves it. The same Section provides that orders issued to major stationary sources are not effective until approved by EPA. This indicates that Congress is well aware of the difference between agency approvals that are a condition precedent to effectiveness of a State-issued order and those that are a condition subsequent. Petitioner here is seeking, in essence, to change a statutory condition precedent to a condition subsequent. The fact that the Fifth Circuit has now suggested that its *American Cyanamid* rule applies if EPA has not acted on a Delayed Compliance Order to a major stationary source within a specified period (*General Motors Corp* v. *EPA*, 871 F.2d 495, 505 (5th Cir. 1989)) does not vitiate this explicit statutory distinction.

[31] In response to this point, petitioner maintains (Br. 27 n.34) that a Governor may issue a four-month suspension order as soon as the request is submitted, that the suspension would run concurrently with the four-month period for EPA review, and that the *American Cyanamid* bar would run after the expiration of that period. Section 110(g), however, does not contain a provision specifying that the Governor's suspension order takes effect immediately; Section 110(f), in contrast, which concerns energy emergencies and which was passed at the same time as Section 110(g), contains precisely such language. See 42 U.S.C. 7410(f)(1) (after President's determination of emergency,

Instead of relying on specific statutory provisions or legislative history to justify an enforcement bar, the *American Cyanamid* court referred to the States' important role in "the statutory scheme" (810 F.2d at 500) and to the congressional finding that " 'the prevention and control of air pollution * * * is the primary responsibility of States and local governments' " (810 F.2d at 500-501, quoting 42 U.S.C. 7401(a)(3)). Petitioner similarly relies on "the statute's carefully crafted balance of state and federal authority." Br. 22. This general emphasis on the role of the States, however, does not supply a proper statutory anchor for the enforcement bar. Moreover, while the States retain important responsibilities under the Act, the States' "primary responsibility" is to be carried out subject to significant oversight by the federal government. Section 110(a), in particular, gives final authority over SIPs and SIP revisions to EPA. See *Train* v. *Natural Resources Defense Council*, 421 U.S. at 92. Since Congress made EPA approval a condition precedent to the effectiveness of a SIP revision, there will *always* be a period during which a State's choice of emission controls will have to await approval by EPA. The result of the *American Cyanamid* rule is that a proposed SIP revision becomes, in effect, the applicable standard after four months in the absence of agency

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Governor's suspension order "may take effect immediately"). The Conference Report, moreover, firmly rebuts petitioner's strained reading of Section 110(g) by stating an intent to "limit the Governor's economic emergency suspension authority to a case in which * * * the Administrator has failed to approve or disapprove such plan revision within the required 4-month period." H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess. 125 (1977). Clearly, the Administrator cannot be said to have "failed" until the four-month period is over; thus a Governor's ability to order a suspension comes into effect only after the four-month period of EPA review, and would be entirely unnecessary if Congress intended a general *American Cyanamid* bar if EPA does not act in four months.

This analysis, of course, proceeds from the premise that a general four-month deadline is intended by Section 110(a)(3)(A). As we have explained (pp. 14-24, *supra*), we believe that four-month review of SIP revisions is required only for such emergency suspensions.

disapproval. But there is simply no support in the statute for such a conclusion.[32]

B. Less Drastic Remedies Than An Enforcement Bar Are Available To Address Agency Delay

In the absence of a specific statutory provision or legislative history suggesting that Congress intended an enforcement bar, petitioner maintains that an enforcement bar should be imposed for various policy reasons. Petitioner urges that such a bar is needed to protect the States' role under the Act (Br. 20-24, 31-34), to protect industry from uncertainty (Br. 34-37), and to discipline the Agency (Br. 37-40). These policy arguments are more properly presented to Congress than to the courts. They

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[32] Amici National Governors' Association, et al. recognize that "[a] complete bar to enforcement proceedings is contrary to Congress's carefully crafted scheme." Br. 18 n.17. The Association et al. nevertheless argue (Br. 18-19) that a district court should bar enforcement unless EPA establishes to the court's satisfaction a basis for disapproving the pending SIP revision. While that proposal is less draconian than the *American Cyanamid* bar, it suffers equally from the disability of having no support in the statute (which unambiguously provides that an existing SIP remains the governing legal standard pending EPA approval of a proposed revision, see pp. 25-26, *supra*). In addition, it conflicts with Congress's decision to vest exclusive review of EPA's decisions on SIP revisions in the courts of appeals. § 307(b)(1); 42 U.S.C. 7607(b)(1); see *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578 (1980). (Amici's reference to Section 307(b)(2), 42 U.S.C. 7607(b)(2), which prohibits review in civil or criminal enforcement proceedings of actions on which court of appeals review could have been obtained under Section 307(b)(1), is unavailing because that prohibition does not confer jurisdiction on the district courts to review SIP revisions.) In any event, Amici's concern that EPA should not enforce the existing SIP if the proposed SIP revision meets the statutory criteria for approval is already addressed by agency enforcement policy. Under that policy, EPA usually does not initiate enforcement actions until it has made a preliminary determination that a pending SIP revision cannot be approved. See EPA, *Revised Guidance on Enforcement of State Implementation Plan Violations Involving Proposed SIP Revisions* 3-6 (Aug. 29, 1989). (Copies of this document have been served on petitioner and lodged with the Clerk of the Court.) In this case, for instance, the enforcement action was not filed until after the proposed disapproval had been published in the Federal Register. See J.A. 91-96.

are, in any event, unpersuasive—especially because explicit statutory provisions already provide less drastic remedies than an enforcement bar, remedies that, unlike petitioner's blunderbuss approach, also preserve the basic statutory protection of the public health.

1. Petitioner's argument about the propriety of an enforcement bar as a remedy (Br. 24-30, 40-45) begins with a fundamental misconception. Petitioner fails to appreciate the exceptional nature of the "remedy" it seeks, and of the rule imposed by the *American Cyanamid* court. In the absence of explicit statutory language divesting an agency of the power to enforce an Act of Congress, courts should be wary of assuming that Congress intended such a result. The principles that govern this inquiry were set out in *Brock* v. *Pierce County*, 476 U.S. 253 (1986). That litigation arose out of an attempt by the Secretary of Labor to recoup misspent job training funds after a government audit of the County's expenditures; the County argued that recovery was barred because the Secretary had failed to complete his investigation and issue a final determination regarding the matter within 120 days, as required by the pertinent statute. *Id.* at 257. Citing "the 'great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided' " (476 U.S. at 260), this Court emphasized the strong presumption against concluding that Congress intended to bar an agency from acting if it missed a deadline for regulatory action (*ibid.*):

> We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act.

The Court explained that a "less drastic remedy" for failure to meet a mandatory deadline would be a suit to " 'compel agency action unlawfully withheld or unreasonably delayed,' " under

the Administrative Procedure Act, 5 U.S.C. 706(1). 476 U.S. at 260 n.7.

The reasoning of *Brock* is fully applicable to this case.[33] Here, as in *Brock*, "[t]here is simply no indication in the statute or its legislative history that Congress intended to remove the [agency's] enforcement powers" if it fails to act in a timely fashion. 476 U.S. at 266.[34] As the court of appeals concluded, and as we shall show, there are less drastic remedies (including but not limited to suits under 5 U.S.C. 706(1)) for addressing untimely action on SIP revisions. See also *Alcan Foil*, 889 F.2d at 1520-1521 ("Clearly remedies less drastic than dismissal are available for EPA's failure to act within four months.").

Petitioner contends (Br. 26) that the reasoning of *Brock* is not applicable because EPA can lift the enforcement bar by taking final actions on proposed SIP revisions. This asserted distinction is inadequate. During the enforcement bar, the Agency would be stripped of its explicit statutory power to enforce applicable clean air requirements; the need for judicial reluctance

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[33] Although *American Cyanamid* was decided some nine months after *Brock*, it failed to advert to that decision. Both the court below (Pet. App. 16a) and the Sixth Circuit in *Alcan Foil* (889 F.2d at 1520) recognized the applicability of *Brock* to the claim that failure to meet a statutory deadline for regulatory action bars agency enforcement of that statute.

[34] As in *Brock*, 476 U.S. at 265, Congress's concern has been that the United States has not been aggressive enough in enforcing the statute, not that enforcement targets were being treated too harshly. See, *e.g.*, S. Rep. No. 1196, 91st Cong., 2d Sess. 21 (1970) ("the [enforcement] provisions of existing law, although less than adequate, have not been used to the fullest extent practicable"); S. Rep. No. 127, 95th Cong., 1st Sess. 52 (1977) ("[d]espite the recalcitrance of some source owners and operators toward expeditiously complying with requirements under the act, few criminal actions have been brought • • •; [t]he enforcement of the Clean Air Act for the past seven years has been minimal at best • • •"); H.R. Rep. No. 294, *supra*, at 71-72 ("[s]tate and local enforcement efforts to date ha[ve] been largely ineffective in bringing about compliance • • •. The adequacy of Federal enforcement efforts was also questioned. • • • [M]any steps need to be taken to improve and expedite Federal, State, and local enforcement activities."). See also *Ohio Environmental Council* v. *United States District Court*, 565 F.2d 393, 397 (6th Cir. 1977) (noting "the strong Congressional policy in favor of prompt enforcement of the Act").

to conclude that an agency's failure "to observe a procedural requirement voids subsequent agency action, especially where important public rights are at stake" (*Brock*, 476 U.S. at 260) is therefore directly relevant. That EPA could ultimately act on a proposed revision (and thus regain its enforcement authority) does not mitigate the fact that it would have been deprived of "its power to act" (*ibid.*) with respect to Clean Air Act violations in the interim—and could be similarly deprived again by submission of another proposed revision relating to the same source. Indeed, Congress has specifically emphasized the importance of imposing monetary penalties to remove the economic benefits of noncompliance and to "place polluters on the same economic footing as those who had limited their emissions through increased anti-pollution expenditures." *Duquesne Light*, 698 F.2d at 463, citing H.R. Rep. No. 294, 95th Cong., 1st Sess. 72-79 (1977). If EPA were barred from collecting penalties for some period of non-compliance with an applicable SIP, this congressional purpose would be irretrievably thwarted, notwithstanding the possibility of prospective relief once EPA is able to take final action on the SIP revision. Contrary to petitioner's advocacy of the enforcement bar, *Brock* counsels that, in the absence of explicit congressional intent, such a frustration of the basic statutory purpose—and such an exceptional result from a failure to observe a deadline for regulatory action—should not be countenanced.[33]

2. Proceeding from this misconception about the nature of the rule it advocates, petitioner advances policy arguments to support the enforcement bar. Petitioner's first policy argument (Br. 20-24) is that an enforcement bar is necessary to preserve

[33] As we have explained (pp. 19-22, *supra*), EPA's inability to take final action within four months is often due to factors beyond the agency's control, such as the requirement for public comment and the need to accommodate State requests for delay. Cf. *Brock* v. *Pierce County*, 476 U.S. at 261 ("[T]he Secretary's ability to complete [his statutory duty] within 120 days is subject to factors beyond his control."). Indeed, the deadline in *Brock*—120 days—is similar to the four-month deadline here, and the process of reviewing SIP revisions is at least as complex as the Secretary's responsibility to resolve the matter of misspent funds at issue in *Brock*.

the partnership between the state and federal governments that the Clean Air Act creates. As an initial matter, it is incongruous for petitioner to be asserting that interest in this case because the Commonwealth of Massachusetts has stated unequivocally in this litigation that, in its view, an *American Cyanamid* enforcement bar should not be imposed. See Massachusetts C.A. Amicus Br. 10-15; Pet. App. 12a. Petitioner thus seeks to assert the State's interest in a case in which the State itself has come to exactly the opposite conclusion.

In any event, an enforcement bar would be unlikely to further the asserted goal of a co-operative relationship between the States and the federal government. Instead, it would place a premium on hurried and inflexible decision-making. In this case, for instance, an enforcement bar would have argued strongly in favor of rejecting the Commonwealth's request for additional time for negotiations. Cf. *Georgia* v. *United States*, 411 U.S. 526, 540-541 (1973) (requiring the Attorney General to act on state reapportionment plans within the 60 day deadline provided in the Voting Rights Act, rather than allowing him to suspend running of period while States submitted additional pertinent information, "would only add acrimony to the administration" of the Act).

To the extent that States are legitimately aggrieved by EPA delay in SIP revision review, moreover, adequate alternative remedies are available. The ruling below contemplates the ability to compel EPA action, if it is unreasonably delayed. *Brock* suggests (476 U.S. at 260 & n.7) that this is precisely the sort of "less drastic remed[y]" that renders an enforcement bar unnecessary. See also *Council of Commuter Organizations* v. *Thomas*, 799 F.2d at 888 (remedy for undue delay on SIP revisions is suit to compel action under Section 304(a)); *United States* v. *Boccanfuso*, 882 F.2d 666, 671-672 (2d Cir. 1989) (Corps of Engineers cannot be estopped from enforcing Clean Water Act on account of its failure to follow deadline contained in its regulations; suit under APA provides "less drastic remedy"). Furthermore, this remedy has the advantage of being

available in all SIP revision cases, not just those few that may implicate enforcement actions.[36]

Under the approach taken by the court of appeals, moreover, there is a substantial incentive for timely agency action because, pursuant to Section 113(b) (42 U.S.C. 7413(b)), the penalties EPA may obtain can be reduced if the source can show that it complied with a proposed SIP revision that was subject to an unreasonable and prejudicial delay. Pet. App. 15a. Like an action to compel agency action – and unlike an enforcement bar – this remedy is explicitly provided by statute. It is also more appropriately tailored to the asserted problem of agency delay than an automatic enforcement bar, which would take effect no matter how reasonable the delay and whether or not the delay caused any prejudice. Although, as petitioner notes (Br. 41),

[36] Two types of actions to compel agency action should be distinguished – a suit to compel agency action under the Clean Air Act (§ 304(a)(2); 42 U.S.C. 7604(a)(2)) and a suit to compel agency action under the Administrative Procedure Act (5 U.S.C. 706(1)). The Clean Air Act provision authorizes a citizen suit "where there is alleged a failure of the Administrator to perform any act or duty • • • which is not discretionary." 42 U.S.C. 7604(a)(2). "In order to impose a clear-cut nondiscretionary duty [for purposes of Section 304(a)(2)] • • • a duty of timeliness must 'categorically mandat[e]' that *all* specified action be taken by a date-certain deadline." *Sierra Club* v. *Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987), quoting from *Natural Resources Defense Council* v. *Train*, 510 F.2d 692, 712 (D.C. Cir. 1974). If there is a categorical mandate in the statute that EPA act on a SIP revision within four months, the remedy to compel agency action would lie under Section 304(a)(2). See Pet. App. 14a (noting that Section 304(a) provides a remedy to compel timely action on SIP revision); *Alcan Foil*, 889 F.2d at 1520-1521 (same); *Council of Commuter Organizations* v. *Thomas*, 799 F.2d at 888 (same). However, if the four-month deadline is in the statute as a "guidepost" rather than as a categorical mandate (as suggested by the court of appeals, Pet. App. 15a), the remedy would be under the APA, rather than Section 304(a)(2). *Sierra Club* v. *Thomas*, 828 F.2d at 788 n.39, 792 n.62; cf. *National Congress of Hispanic American Citizens* v. *Usery*, 554 F.2d 1196 (D.C. Cir. 1977); *National Congress of Hispanic American Citizens* v. *Marshall*, 626 F.2d 882, 891 (D.C. Cir. 1979). And, if a four-month deadline does not apply at all, suits to compel agency action unreasonably delayed may still be brought under the APA. *Sierra Club* v. *Thomas*, 828 F.2d at 796-797; *Cutler* v. *Hayes*, 818 F.2d 879, 895 & n.137 (D.C. Cir. 1987). Under any of these interpretations, judicial relief is available to compel agency action unjustifiably delayed.

this remedy will require judicial inquiry in enforcement cases, it is the kind of judicial inquiry in enforcement actions that the statute contemplates. See 42 U.S.C. 7413(b).[37]

States may also use non-judicial remedies to protect their interest in timely action on SIP-revision proposals. The States can and have expressed their concerns directly to EPA. The agency, in response, has implemented significant reforms designed to speed up the SIP review process. Indeed, EPA's recent SIP Process Reform is a product of a task force made up of State and EPA officials. See 54 Fed. Reg. 2215-2216 (1989). Carrying out the recommendations of the task force, EPA has implemented significant changes in its SIP processing procedures, including: review of proposed SIP revisions for completeness against specific criteria, and a requirement of prompt modification of incomplete submittals; delegation of decisional authority to Regional Administrators for SIP actions which are not nationally significant; identification of minor revisions which do not require notice and comment; use of expedited notice and comment procedures for other revision proposals; and provision for "grandfathering" of SIP revisions prepared in

[37] Indeed, the *Alcan Foil* court, while expressing skepticism about the efficacy of a suit to compel agency action, found the assessment-of-penalties provision itself a sufficient alternative remedy, and one already provided by statute. 889 F.2d at 1520-1521.

The Brief Amcius Curiae of the Chamber of Commerce of the United States charges (Br. 15) that EPA engaged in "calculated conduct" to deprive the State of Kentucky of its statutory prerogatives, by allegedly delaying action on a SIP revision until applicable requirements changed in a way that undercut the proposed revision. This contention was raised by Alcan Foil for the first time during EPA's appeal to the Sixth Circuit, and was sharply disputed by EPA. The court of appeals did not resolve the issue, noting that it should be considered by the district court on remand. 889 F.2d at 1521. As a general matter, it seems plain that penalties would be unwarranted for a period of prejudicial delay that was caused solely by the deliberate conduct of the agency. Even if a delay was not deliberate, we agree that the source's good faith in complying with a clearly approvable SIP revision would be a factor the district court should consider in determining whether to assess penalties. Conversely, if the proposed SIP revision is clearly deficient, a source's reliance on it would not warrant a reduction in penalties.

good faith by a State but which may become deficient because of a change in EPA policy subsequent to state submission. *Id.* at 2217-2220. These changes, brought about by a cooperative State-federal effort, should go far toward meeting any state concerns about excessive delay.

At the same time, the interest of all States – and of the general public – in clean air would be undermined by an enforcement bar. As Massachusetts itself put it in arguing against an enforcement bar in the court of appeals, "[s]ince the existing SIP is not suspended in any sense by the pendency of a proposed revision and remains the valid standard * * * EPA must be able to enforce it." Massachusetts C.A. Amicus Br. 11. See also Pet. App. 16a ("We find it significant that not even the Commonwealth argues for an enforcement bar, thus recognizing that its interests occasionally must yield to the overriding goal of improving our nation's air."). Furthermore, an enforcement bar would provide an incentive for quick action only in SIP revision review cases where enforcement is implicated, *i.e.*, cases where the proposed SIP revision loosens restrictions or deadlines. It could thus have the perverse result of encouraging the Agency to concentrate scarce resources on SIP revisions that relax air quality requirements, drawing resources away from the many SIP revisions that tighten requirements or deadlines.[38]

3. Petitioner's second policy argument (Br. 34-37) is that an enforcement bar is necessary to avoid "seriously negative impacts on regulated industries." *Id.* at 34. This contention is unfounded.

The thrust of petitioner's objection is that industries are subject to "conflicting federal and state regulatory requirements." Br. 34. This asserted "conflict," however, stems from the Act's requirement that EPA approve a state SIP revision before it can become effective. Thus, as petitioner recognizes (Br. 34 n.43), there will always be a period during which a State-proposed revision and a federally-approved SIP will differ. If federal and

[38] Petitioner specifically urges (Br. 25-26) that EPA should give priority attention to those SIP revisions that are relevant to enforcement actions. Congress, however, has given no indication that EPA should so order its priorities.

state requirements are actually in conflict, however, by virtue of the federal requirement being more stringent than the state requirement, then the federal requirement clearly controls under basic preemption principles. See, *e.g.*, *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n*, 109 S. Ct. 1262, 1273 (1989); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963).[39] Moreover, the Clean Air Act itself makes clear that the approved SIP is the "applicable implementation plan" until a revision is approved by EPA (§ 110(d); 42 U.S.C. 7410(d)).[40]

Even if there were a problem with inconsistent obligations, however, an enforcement bar is not well-tailored to address it. For one thing, it would operate even where, as here, there is no threat of inconsistent state enforcement. For another, the "certainty" it promises would be illusory because the source would be subject to the possibility of a citizen suit to enforce the existing SIP even if EPA's hands were tied.[41] Instead of producing

[39] This principle fully applies to petitioner's hypothetical example (Br. 35 n.45) of conflicting equipment requirements: in the case of a direct conflict, the federal requirement controls. To the extent petitioner suggests that its hypothetical describes this case, petitioner is mistaken. The Massachusetts SIP contained emission limitations for sources of pollutants, effective December 31, 1985. The choice of methodologies (and equipment) for meeting that limitation was the source's. See J.A. 29.

[40] If the proposed revision is *more* stringent than the approved SIP, and if it is immediately applicable as a matter of state law, the state law is enforceable (42 U.S.C. 7416). In such a circumstance, compliance with the more stringent state requirement would subsume compliance with, and not "conflict" with, the less stringent federal requirement.

[41] The Clean Air Act provides that a citizen may file an injunctive action against any source "alleged to be in violation of * * * an emission standard or limitation under this chapter," which is defined to include "a schedule or timetable of compliance" and "any condition or requirement under an applicable implementation plan relating to * * * air quality maintenance plans." §§ 304(a)(1), (f)(1), and (f)(3); 42 U.S.C. 7604(a)(1), (f)(1), and (f)(3). Although the *American Cyanamid* court had no occasion to consider whether a citizen suit to enforce the applicable implementation plan would also be barred if EPA takes more than four months to act on a SIP revision proposal, that court's concerns to penalize EPA for its delay and to insure against improper rejection of a SIP revision logically would not apply to citizens

certainty, an enforcement bar would lead to a situation where enforcement may or may not take place depending on whether there exists a citizen group willing and able to mount the challenge. Cf. Amicus Br. of National Governors Ass'n, et al. 18 n.17 ("It would be anomalous to create a situation in which States could enforce, private citizens could enforce; but the expert federal agency with explicit statutory authority could not.").[42]

Petitioner's additional suggestion (Br. 36) that an enforcement bar is needed to protect companies which "undertake improved compliance strategies" is also unpersuasive. EPA can bring an action only when the source fails to comply with the existing SIP. If the source is truly undertaking "improved" compliance, this problem should not arise. To the extent that it does arise—because, as petitioner claims, non-compliance with the existing SIP is justified by long-term investments in better compliance technologies and by interim compliance with the proposed SIP revision—the possible reduction of penalties in Section 113(b) is once again an adequate remedy. Such claims go to the "equities of [the] case" (Pet. App. 17a) and the "seriousness of the violation" (§ 113(b); 42 U.S.C. 7413(b)) that are part of the district court's consideration of penalties.[43]

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bringing an enforcement action. Moreover, it would violate the language and spirit of Section 304 to bar citizen suits merely because EPA could not bring an action. Congress spelled out the limits on citizens suits with specificity; such an action is barred where EPA "is diligently prosecuting a civil action" (§ 304(b)(1)(B); 42 U.S.C. 7604(b)(1)(B)), but not where EPA has been disqualified from doing so because of its delay.

[42] To reduce any differences between state and federal requirements while a SIP revision is pending, EPA has provided States with the option of "parallel processing" in which the state and federal processes would proceed simultaneously. See 47 Fed. Reg. 27,073-27,074 (1982). Contrary to the statement of amici Motor Vehicle Manufacturers Association et al. (Br. 14 & n.14), EPA has never "discontinued" the parallel processing option, and the procedure is used when a State appropriately chooses to exercise that option. See, *e.g.*, 54 Fed. Reg. 14,969 (1989).

[43] Petitioner's contentions about its own efforts at "improved compliance" (Br. 36; see also Br. 6) can of course be appropriately presented to the district court. In light of petitioner's submission of its claim to this Court as a justification for an across-the-board enforcement bar, however, it may be notable that petitioner's decision to replace the existing lacquer lines with a BC/CC system was made explicitly to "enable the plant to produce vehicles with a finish quality competitive in today's world market" and to be "consistent with the trend in the entire domestic auto industry" (J.A. 41); that the BC/CC system was no longer "innovative" technology by 1985 (J.A. 94); and that the reason for low emission rates at the new facility was, at least in part, the separate statutory requirement of a "lowest achievable emission rate" for a new facility in a nonattainment area (42 U.S.C. 7502(b)(6), 7503(2)). Furthermore, construction of the new facility does not necessarily justify the continuing high rate of emissions from the old facility after the SIP compliance date and before petitioner closed it. Finally, petitioner's comparison of the $20 million cost of placing emission controls on the lacquer lines with the $200 million cost of the BC/CC system (Br. 6 & n.3) overlooks the fact that the $20 million figure represents the cost of pollution controls, while the $200 million figure represents the cost of an entire replacement coating facility which petitioner desired to install, at least in substantial part, for competitive reasons unrelated to pollution control (J.A. 41).

4. Petitioner's third policy argument (Br. 37-40) is that an enforcement bar is needed to preserve the integrity of EPA's SIP review process. However, the speculative possibility that an enforcement action could undermine even-handed administration and influence the outcome of the final decision on a SIP revision stems not from agency delay but from Congress's decision to assign both enforcement and SIP review responsibilities to the same agency (Pet. App. 16a-17a). Congress evidently concluded that the two functions could be carried out fairly by the same agency. Moreover, Congress provided an adequate remedy for anyone aggrieved by an allegedly biased decision by providing for review of final agency decisions in the courts of appeals. § 307(b)(1); 42 U.S.C. 7607(b)(1). See also *Bethlehem Steel Corp.* v. *EPA*, 638 F.2d 994, 1010 (7th Cir. 1980) (appropriate remedy where enforcement considerations may have improperly affected EPA's decision on delayed compliance order is vacation and remand to agency under Section 307(b)). Indeed, petitioner has filed suit under Section 307(b) to challenge the propriety of EPA's denial of the SIP revision in

this case (*supra* at n.8).[44] This Court should reject the invitation to create an additional remedy to address this asserted problem, especially one as broad as a complete preclusion of enforcement whenever EPA has taken more than four months to act on a SIP revision. See *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981)) ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it") (quoting *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979)). See also *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 574 (1979) (the Court is

[44] Petitioner's particular allegations challenging EPA's denial of the proposed SIP revision will be considered in that action with the benefit of a full record, and are not properly considered here. Once again, however, because petitioner repeats those allegations so persistently, a brief comment on two points is warranted. First, petitioner claims that a reference in the December 2, 1986, notice of proposed disapproval to "an enforcement mechanism" is evidence of improper commingling of functions. Br. 38 n.48. See J.A. 96 ("This disapproval will prevent GM from deferring the topcoat and final repair compliance dates (from December 31, 1985 to August 31, 1987) by revising the State regulation. Extensions of the December 31, 1985 date should instead be obtained through an enforcement mechanism."). However, the reference is simply to the Delayed Compliance Order (DCO) procedure, spelled out in the enforcement section of the Act (§ 113(d); 42 U.S.C. 7413(d)). A DCO contains a schedule with increments of progress that ensures compliance as expeditiously as practicable, and has several other advantages over a SIP revision, which does not provide the same certainty of expeditious compliance. Congress contemplated that extensions would generally be handled through this procedure (see H.R. Rep. No. 294, *supra*, at 56-58), and extensive negotiations regarding a possible DCO took place while EPA was reviewing the proposed SIP revision (J.A. 75, 89). This reference to the DCO procedure in no way indicated that EPA had ceased to view the SIP revision proposal as a regulatory matter.

Second, petitioner emphasizes (Br. 38) that the final disapproval was published in the Federal Register on September 16, 1988, which was also the day that EPA's opening brief was filed in the court of appeals. (The Administrator had signed the final disapproval twelve days earlier, on September 4, 1988. 53 Fed. Reg. 36,014.) Petitioner's suggestion that this evidences some impropriety on EPA's part is without foundation, and, in any event, can be considered fully in the pending action challenging EPA's disapproval of the SIP.

"extremely reluctant to imply a cause of action * * that is significantly broader than the remedy that Congress chose to provide").

5. The *American Cyanamid* court explicitly rested its enforcement bar, in part, on a closely related policy argument – an asserted need to punish the agency for delay. See *American Cyanamid*, 810 F.2d at 499 n.9 (rejecting *Duquesne Light* approach because, under it, "EPA * * * pays no price for its contumaciousness"); Pet. Br. 21. That rationale fails for several reasons.

As an initial matter, careful EPA evaluation of proposed revisions, which must be issued for public comment and submitted to OMB review, will generally take substantially longer than four months. EPA has itself established timetables for agency action which are a far more realistic reflection of the underlying legal and administrative complexities presented by SIP revisions that may involve many federal, state, and private parties and that must also clear the hurdles posed by prevailing administrative law jurisprudence. In these circumstances, failure to observe a four-month timetable hardly merits automatic and severe judicially-invented punishment.

Moreover, as the court of appeals in this case noted, "[i]f the EPA cannot enforce existing standards, it is the public and not the EPA that is hurt." Pet. App. 14a. See also *Alcan Foil*, 889 F.2d at 1520 ("The public should not suffer because of EPA's failures."); D. Currie, *supra*, at 114 (result of *American Cyanamid* is that "the public is punished for the Agency's inaction"). Under the *American Cyanamid* rule, EPA is absolutely banned from enforcement actions after the four-month period and during the pendency of a SIP revision proposal. The Agency cannot enforce the approved SIP, even though it remains the "applicable implementation plan" (§ 110(d); 42 U.S.C. 7410(d)), and it cannot even enforce the proposed SIP because it is not yet the "applicable implementation plan." It does no disservice to the States to recognize that they are sometimes put under enormous pressure to accommodate major sources of employment. Congress recognized this fact of life when it pro-

vided for federal review of SIPs and SIP revisions.[45] An enforcement bar could encourage non-complying sources to propose, and States to submit, last-minute SIP revision proposals for the purpose of staying EPA enforcement actions and postponing compliance with SIP provisions which Congress required to be achieved within the deadlines set forth in the Act.[46] If existing SIPs cannot be enforced by EPA, noncomplying sources in States that propose revisions will gain unfair advantage over those in other States, and the public will suffer from further delays in attainment of national air quality standards, contrary to Congress's clear intent.[47] In light of the fact that EPA is rarely able to complete final action on SIP revisions within four months, adoption of the *American Cyanamid* rule would seriously undermine the Agency's ability to enforce the Act as Congress intended.

The facts of this case illustrate the negative results of an enforcement bar. Petitioner had more than ample time (five years) to bring its plant into compliance with the emission limits of the 1980 SIP either by installing control devices on its lacquer coating lines or by converting to the basecoat/clearcoat process without undue delay. Instead of making the investment necessary to achieve this result, petitioner waited until shortly before the deadline to propose a solution that by that time re-

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[45] Cf. *United States* v. *Ford Motor Co.*, 814 F.2d at 1102 ("[I]f state control of ambient air emissions were final, in short order, major shifts of smoke stack industries to states with the most lenient pure air standards would inevitably take place."). See also J.A. 125 (district court notes hardship to Framingham workers if "the plant was moved out of state").

[46] Cf. W. Rodgers, *supra*, at § 3.39 ("The decision in *American Cyanamid* extends to the polluter the profit from delay. • • • [T]he opinion may encourage SIP-submitters to develop the art of the 'unapprovable package,' replete with data shortages and loose ends • • •.").

[47] See, *e.g.*, H.R. Rep. No. 294, *supra*, at 72 ("The more [that] legal challenges to the regulations can delay enforcement, the longer any investments for control equipment can be deterred."); *Duquesne Light*, 698 F.2d at 463 (Congress added the Section 120 recoupment provisions in 1977, in part because "the expense of reducing emissions [was] making it profitable for industry to delay needed expenditures as long as possible").

quired a one and one-half-year extension of the SIP time limits. Allowing petitioner to follow this course of conduct without penalty would ignore the damage to the public interest caused by the one and one-half-year delay in reaching the stricter emission limits, and would give petitioner an economic advantage over companies that made the investments necessary to meet applicable limits in a timely fashion. Worse, adopting an enforcement bar could encourage other sources to propose last-minute SIP revisions, secure in the knowledge that EPA would not be able to enforce the deadlines of the existing SIP for a significant length of time.[48]

Most fundamentally, the punishment rationale—and the *American Cyanamid* rule generally—reflects a serious misconception of the court's role. Congress provided for enforcement of the "applicable" SIP (42 U.S.C. 7413(b)(2)), and made no exception for the situation when a proposed revision has been pending for more than four months. It is not the province of the judiciary to carve out such an exception based on notions of "what accords with 'common sense and the public weal.' " *TVA* v. *Hill*, 437 U.S. 153, 195 (1978). Cf. *National Crushed Stone*, 449 U.S. at 83 (" 'The question • • • is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended • • •' ") (quoting from *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 (1977)).

Thus, neither the asserted concern for the role of the States, nor the claim of unfairness to industry, nor the stated need to discipline and punish the Agency justifies an enforcement bar. To the extent that such concerns are substantial, less drastic

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[48] The *Alcan Foil* court stated in dictum that "the court may assess penalties from the date of the notice of noncompliance" (889 F.2d at 1521). In fact, however, in a Section 113 proceeding, penalties may be assessed from the first day of violation (see, *e.g.*, *United States* v. *SCM Corp.*, 667 F. Supp. 1110, 1122-1123 (D. Md. 1987)); in a Section 120 proceeding, in contrast, as in *American Cyanamid*, the statute is explicit that administrative penalties accrue only from the date of a "notice of noncompliance" (§ 120(d)(3)(C); 42 U.S.C. 7420(d)(3)(C)).

remedies are readily available and are already provided by statute.[49] Accordingly, the court of appeals correctly reinstated the enforcement action against petitioner and remanded for consideration of appropriate penalties, if any.

We agree with the court of appeals (Pet. App. 15a, 17a) that the district court in setting penalties may consider the equities of the case along with the reasonableness of the period taken by EPA for processing the SIP revision and, if unreasonable, any resulting prejudice to petitioner. The reasonableness of any Agency delay will depend on a number of factors, including whether the SIP revision presented novel or complex issues, and whether the delay was caused by EPA or by other parties.[50] The district court will then have a full opportunity to take account of the various claims of unfairness which petitioner here asserts in favor of an enforcement bar.

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[49] As we noted in our brief in opposition to certiorari (at 14-15), Congress is currently considering proposed amendments to the Clean Air Act regarding EPA review of SIP revisions. We will keep the Court apprised of any pertinent developments.

[50] Issues which may arise in future cases are context-specific, and per se rules would generally be inadvisable. The reasonableness inquiry should be informed, however, by the Agency guidelines on SIP revision processing (see p. 23, *supra*). While those guidelines have been adopted for internal Agency purposes and do not confer rights on other persons, they generally illuminate a proper reconciliation of the need for prompt action on SIP revisions with the need to comply with rulemaking requirements and to carry out the important review role that Congress intended.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

In addition to the statutory provisions set out in the Appendix to petitioner's brief, the following provisions of the Clean Air Act are pertinent.

1. Section 110(d), 42 U.S.C. 7410(d), provides:

(d) Applicable implementation plan

For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements the requirements of this section.

2. Section 110(g), 42 U.S.C. 7410(g), provides:

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within the required four month period, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The

Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

* * * * *

3. Section 113, 42 U.S.C. 7413, provides in pertinent part:

(a) Finding of violation; notice; compliance order; civil action; State failure to enforce plan; construction or modification of major stationary sources

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrtor may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

* * * **

(b) Violations by owners or operators of major stationary sources

The Administrator shall, in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both, whenever such person –

(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or

(2) violates any requirement of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section of a finding that such person is violating such requirement * * *.

* * * * *

4. Section 172, 42 U.S.C. 7502, provides in pertinent part:

(a) Expeditious attainment of national ambient air quality standards

(1) The provisions of an applicable implementation plan for a State relating to attainment and maintenance of national ambient air quality standards in any nonattainment area which are required by section 7410(a)(2)(1) of this title as a precondition for the construction or modification of any major stationary source in any such area on or after July 1, 1979, shall provide for attainment of each such national ambient air quality standard in each such area as expeditiously as practicable, but, in the case of national primary ambient air quality standards, not later than December 31, 1982.

(2) In the case of the national primary ambient air quality standard for photochemical oxidants or carbon monoxide (or both) if the State demonstrates to the satisfaction of the Administrator (on or before the time required for submission of such plan) that such attainment is not possible in an area with respect to either or both of such pollutants within the period prior to December 31, 1982, despite the implementation of all reasonably available measures, such provisions shall provide for the attainment of the national primary standard for the pollutant (or pollutants) with respect to which such demonstration is made, as expeditiously as practicable but not later than December 31, 1987.

(b) Requisite provisions of plan

The plan provisions required by subsection (a) of this section shall –

(1) be adopted by the State (or promulgated by the

Administrator under section 7410(c) of this title) after reasonable notice and public hearing;

(2) provide for the implementation of all reasonably available control measures as expeditiously as practicable;

(3) require, in the interim, reasonable further progress (as defined in section 7501(1) of this title) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;

* * * * *

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No. 89-369

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONER GENERAL MOTORS CORPORATION

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TABLE OF CONTENTS

	Page
INTRODUCTION	2
ARGUMENT	4
I. THE STATUTE REQUIRES EPA TO COMPLETE ITS REVIEW OF SIP REVISIONS WITHIN FOUR MONTHS	4
A. The Statutory Language Plainly Requires EPA To Act Within Four Months	5
B. The Language Of Section 110(g) Confirms The Four-Month Rule	7
C. The Administrative Procedure Act And EPA's Dilatory Practice Do Not Support EPA's Position That A Review Period Of More Than Four Months Is "Reasonable"	8
II. A BAR ON ENFORCEMENT IS THE REMEDY MOST CONSISTENT WITH THE LANGUAGE AND PURPOSES OF THE STATUTE WHERE EPA HAS FAILED TO ACT ON A SIP REVISION	9
A. The *American Cyanamid* Remedy Is Consistent With The Intent Of Congress	9
B. The First Circuit's Remedy Is Inconsistent With The Statute	11
C. The Fifth Circuit's Approach Is Consistent With This Court's Decision In *Brock*	13
III. THE FIRST CIRCUIT'S ALTERNATIVE REMEDIES ARE NOT "ADEQUATE"	14
IV. THE CONCERN OF CERTAIN STATE *AMICI* WITH THE AMERICAN CYANAMID REMEDY IS MISPLACED	16
CONCLUSION	20

TABLE OF AUTHORITIES

CASES:	Page
American Cyanamid Co. v. *EPA*, 810 F.2d 943 (5th Cir. 1987)	*passim*
Brock v. *Pierce County*, 476 U.S. 253 (1976)	13,14
Dole v. *United Steelworkers*, 58 USLW 4200 (Feb. 21, 1990)	5
General Motors Corp. v. *EPA*, 871 F.2d 495 (5th Cir. 1989)	19
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	10
Moser v. *United States*, 341 U.S. 41 (1951)	9
Natural Resources Defense Council v. *Thomas*, 705 F. Supp. 1 (D.D.C. 1988)	15
Pennsylvania v. *Union Gas Co.*, 109 S. Ct. 2273 (1989)	5
Pilot Life Ins. Co. v. *Dedeaux*, 481 U.S. 41, (1987)	5
Public Service Company of Indiana v. *EPA*, 682 F.2d 626 (7th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983)	6
Sierra Club v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (7th Cir. 1983)	10
Sierra Club v. *Ruckelshaus*, 602 F. Supp. 892 (N.D. Cal. 1984)	15
Sierra Club v. *Thomas*, 828 F.2d 783 (D.C. Cir. 1987)	13
Train v. *Natural Resources Defense Council*, 421 U.S. 60 (1975)	6,11
Union Electric Co. v. *EPA*, 427 U.S. 246 (1976)	6
United States v. *Alcan Foil Products*, 889 F.2d 1513 (6th Cir. 1989)	15

STATUTES AND REGULATIONS:

5 U.S.C. § 555	8
42 U.S.C. § 7410(a)(2)	5,6,18,19
42 U.S.C. § 7410(a)(2)(H)	6

Table of Authorities Continued

	Page
42 U.S.C. §§ 7410(a)(2)(I)	6,7
42 U.S.C. § 7410(a)(3)	5,6
42 U.S.C. § 7410(d)	10
42 U.S.C. § 7410(g)	7
42 U.S.C. § 7413	3,11
42 U.S.C. § 7426	19
42 U.S.C. § 7502	6,7
42 U.S.C. § 7604	14
42 U.S.C. § 7607(b)(1)	12,13
40 C.F.R. § 52.1122(d)	3
55 Fed. Reg. 5824 (1990)	8
50 Fed. Reg. 20602 (1985)	2
49 Fed. Reg. 3647 (1984)	2
48 Fed. Reg. 46047 (1983)	2

MISCELLANEOUS:

The Budget for Fiscal Year 1991	9
EPA, *State Implementation Plan Processing Reform*, 54 Fed. Reg. 2214 (1989)	8,9
Memorandum from J.L. Hanish, EPA Region 1 State Air Programs Branch Chief (May 19, 1986)	2,3,4,16
S. Ct. R. 21	5

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REPLY BRIEF FOR PETITIONER GENERAL MOTORS CORPORATION

Both in its opposition to the four-month rule, and in its arguments against the *American Cyanamid* remedy, the government's brief attempts to portray EPA's position as wholly predetermined by the statute—and *American Cyanamid*, in contrast, as a judicial frolic that ignores statutory requirements. Nothing could be further from the truth. Indeed, in order to achieve its purported harmony with the statute, the government is reduced to ignoring key statutory provisions and policies, contradicting the Agency's own well-established interpretation of other provisions, and even characterizing one provision of the statute as a "mistake." Obviously, none of these efforts are consistent with accepted principles of statutory interpretation.

INTRODUCTION

The government portrays EPA as a victim of the *Cyanamid* bar, and suggests that General Motors was trying simply to delay compliance. This portrayal is inaccurate and misleading. Because the government argues that the facts of this case illustrate the results of an enforcement bar (U.S. Br. 42), we are compelled to respond to the government's mischaracterization of the facts.

1. The government repeatedly states that GM waited until just before the 1985 deadline to request a SIP revision. (U.S. Br. 6, 7, 42, 43). That is flatly wrong. GM first requested an extension of time to 1987 in a letter to Massachusetts dated July 6, 1982. GM reiterated this request to the Commonwealth on November 20, 1984, and again on June 7, 1985. (J.A. 38-45).[1]

2. Contrary to the government's suggestion, GM's request for an extension of time was not made to seek an economic advantage over its competitors. (U.S. Br. 32, 42, 43). Instead, GM was seeking equal treatment under EPA's 1981 policy, which was designed broadly to "reduce the regulatory burden on the motor vehicle industry."[2] EPA had previously granted SIP revisions and similar technology waivers to Ford and Chrysler.[3] In reliance on EPA's policy,

[1] Massachusetts had to go through its own review as well as public comment on the SIP revision, and GM could not control the timing of the submission of the SIP revision by the Commonwealth. EPA was hardly surprised by a "last-minute SIP revision." Indeed, in *April 1985, EPA advised the Commonwealth that the GM extension should be submitted as a SIP revision.* Memorandum from J.L. Hanish, EPA Region I State Air Programs Branch Chief, dated May 19, 1986, at p. 2 ("Hanish memo") (copy lodged with the Clerk of the Court). It is noteworthy, moreover, that EPA's 1981 policy contains no deadline for requesting such extensions. (J.A. 30-37).

[2] J.A. 30. EPA's October 1981 policy statement was adopted to address the worsening economy and industry's difficulties in developing and installing needed air control technology in dozens of plants around the country (GM alone had 33 plants) as well as to encourage the use of innovative technology.

[3] *See, e.g.*, 50 Fed. Reg. 20602 (1985) (Ford); 49 Fed. Reg. 3647 (1984) (Ford); 48 Fed. Reg. 46047 (1983) (Chrysler); GM Br. at 6 n.4 and n.5.

GM installed an environmentally superior paint shop at a cost of over $200 million—far more than would have been required simply to meet the requirements of the existing Massachusetts regulations.[4]

3. The government makes much of the fact that Massachusetts requested that EPA delay action on the SIP revision for 20 days in order to allow negotiations to continue on a Delayed Compliance Order ("DCO"). (U.S. Br. 7, 21, 33). This minor 20-day delay was prompted *by EPA*, not the Commonwealth.[5] It is disingenuous for the government now to rely on a delay EPA itself initiated.

4. The government claims that EPA's policy is not to initiate enforcement until it has made a preliminary decision not to approve a SIP revision, citing EPA's December 1986 proposal. (U.S. Br. 7-8, 29 n.32). EPA did not follow any such policy here. The EPA Region I staff in Boston informed General Motors early in 1986 that it could obtain an extension of time only if it agreed to a DCO, which is an *enforcement* order, and paid substantial *penalties*.[6]

[4] *See* GM Br. at 6 & n.3. EPA and the American Lung Association testified at the Massachusetts hearings; neither opposed approval of the SIP revision. J.A. 62. EPA has set December 31, 1987, as Massachusetts' deadline for attainment pursuant to the statute. *See* 40 C.F.R. § 52.1122(d).

[5] *EPA itself* "requested that [Massachusetts] withdraw the SIP revision" altogether because EPA wanted to handle the matter "through a DCO." *See* Hanish memo, *supra*, n.1, at p. 3. When Massachusetts refused to do so, EPA requested that the Commonwealth submit a request to delay action on the SIP revision for 20 days. EPA's request was an effort to put pressure on General Motors to agree to a DCO.

[6] *See* Hanish memo, n.1 *supra*, at 1, 3; 42 U.S.C. § 7413(d). *See also* GM Br. 7, n.6. Negotiations concerning a DCO did not bear fruit because General Motors would not agree to pay penalties and insisted that the EPA Region I staff implement the Agency's 1981 policy.

The government attempts to argue that, aside from enforcement considerations, the Massachusetts SIP revision was not approvable. It asserts that the SIP revision did not require GM to limit emissions for the interim period during the 1985-1987 extension and thus failed to implement control technology as expeditiously as practicable. (U.S. Br.

In summary, the facts in this case demonstrate the pernicious effects of the absence of an enforcement bar. EPA secretly abandoned its own 1981 policy and manipulated the SIP process.[7] In doing so EPA not only ignored the Commonwealth's considered choices as to how to implement its program, but it prejudiced a company that invested over $200 million in environmentally superior technology in reliance on EPA policy.

ARGUMENT

The government's brief makes virtually no effort to explain how an enforcement action in this situation can be regarded as consistent with the primacy of state regulation embodied in the Clean Air Act. By delaying, often for years, its supposedly limited review of a SIP revision—while insisting that it may bring enforcement actions to enforce the original SIP—EPA has effectively given itself a "pocket veto" power over SIP revisions that is nowhere authorized in the statute. EPA has also precluded the states from properly meeting their own obligation to effectuate the public interest. The government's brief fails to explain how anyone—including the public, the states, or private industry—will benefit from the regulatory chaos that EPA has created.

I. THE STATUTE REQUIRES EPA TO COMPLETE ITS REVIEW OF SIP REVISIONS WITHIN FOUR MONTHS.

The government argues that the statute does not require EPA to act on a SIP revision within four months.[8] Section

7-8). This reasoning is inconsistent with EPA's 1981 policy. The policy stated that EPA "*does not recommend that states impose interim emission limitations*" on plants, but instead allow the industry "to concentrate on compliance with ultimate emission limits." (J.A. 35) (emphasis added).

[7] The Agency exercised a pocket veto to "hold the line" on SIP revisions in order to pursue its preferred enforcement goals. *See* Hanish memo, supra n.1, at p.1.

[8] It is General Motors' view that the existence of the four-month rule should not be an issue here. *See* Sup. Ct. R. 24.1(a). Contrary to the

110(a) of the statute and the unanimous weight of judicial opinion state otherwise, as do all of the various *amici* before this Court.

A. The Statutory Language Plainly Requires EPA To Act Within Four Months.

The government's brief parses the language of § 110(a)(3) of the Clean Air Act and asserts that the provision does not explicitly state that EPA must act in four months. That is correct. However, § 110(a)(3) was clearly drafted as a provision of incorporation. Indeed, § 110(a)(3), by itself, imposes virtually no requirements on SIP revisions or on EPA review of such revisions. Instead, the provision directs the reader to § 110(a)(2), the provision dealing with original SIPs, for the applicable requirements.

The government argues that since § 110(a)(3) is similar to the second sentence of § 110(a)(2), which deals with substantive standards for approval, only the second sentence should be read as incorporated in § 110(a)(3). (U.S. Br. 16).[9] However, in other cases EPA has construed the first sentence of § 110(a)(2), which includes the four-month rule, as applying to SIP revisions as well. For example, the first sentence of § 110(a)(2) expressly permits EPA to "approve or disapprove" a SIP "or any portion thereof." Section 110(a)(3), on the other hand, only grants EPA authority to

assertion in the government's brief (U.S. Br. at 14 n.11), a determination by this Court that the statute does not impose a four-month time limit would not constitute an alternative ground for affirming the First Circuit's decision. The First Circuit's decision was expressly based upon a determination that the statute *does* require EPA to act within four months.

[9] This Court has emphasized that in interpreting a statute, "we are not guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Dole* v. *United Steelworkers*, 58 USLW 4200, 4202 (Feb. 21, 1990), quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987). *See Pennsylvania* v. *Union Gas Co.*, 109 S. Ct. 2273, 2278 n.2 (1989). Construed as a whole, Section 110 of the Clean Air Act plainly establishes a four-month deadline for EPA review.

"approve" a revision, and makes no mention of partial approval. EPA has always interpreted § 110(a)(3) as permitting partial approval of SIP revisions,[10] an interpretation that is consistent with the overall thrust of § 110(a)(3) as incorporating *all* of the procedural and substantive authority (and limitations on authority) provided in Section 110(a)(2).

The government also points to the fact that § 110(a)(2) requires EPA to act "within four months after the date required for submission of a plan." The government asserts that this language cannot apply to SIP revisions, because revisions are never "required." (U.S. Br. 16). This argument is simply wrong. There are several circumstances in which the statute does "require" a state to submit a revision to its plan, as, for example, when national air quality standards are revised, 42 U.S.C. § 7410(a)(2)(H), or when an area has been designated as "nonattainment." 42 U.S.C. §§ 7410(a)(2)(I), 7502. (*See* U.S. Br. 4). And, of course, a state may decide for itself that a revision is "required" as a result of changes in the circumstances that underlay the policy choices embodied in the original SIP.[11]

There is every reason to believe that Congress viewed a state's *continuing* policy choices concerning SIP requirements to be just as important as its initial choices. As noted by the government, the 1977 amendments to the Act required each state containing a nonattainment area to

[10] *See Public Service Company of Indiana* v. *EPA*, 682 F.2d 626, 632 (7th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983). EPA also obviously interprets section 110(a)(3) as permitting it to disapprove a SIP revision, even though, again, such authority is only granted in section 110(a)(2) and is not mentioned in section 110(a)(3).

[11] Congress clearly intended that the states, and not the federal government would take the lead in developing and evolving implementation programs under the Act. *See Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 79-80 (1975); *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976).

prepare a revised SIP by July 1, 1979.[12] EPA also actively encourages the states to revise their SIPs to take into account improved technology or other changed circumstances. The same urgency applicable to original SIPs is necessary for SIP revisions if the goals of Congress are to be met.

B. The Language Of Section 110(g) Confirms The Four-Month Rule.

The Clean Air Act does in fact state expressly that EPA review of SIP revisions within four months is "required." This language appears in § 110(g) of the Act, which deals with temporary emergency suspensions. 42 U.S.C. § 7410(g). The statute requires the states to propose such suspensions as ordinary SIP revisions, but permits a state to declare a suspension unilaterally if EPA has not acted to disapprove the revision "within the required four month period.[13]

The government theorizes that the reference to the four-month requirement in § 110(g) was a mistake representing nothing more than a residual reference to a requirement in the House bill that Congress intended to delete. (U.S. Br. 19). However, nothing other than pure speculation is offered to support this theory.[14] Absent clear and convinc-

[12] 42 U.S.C. §§ 7410(a)(2)(I), 7502(b). (U.S. Br. 4). These revisions are an important component of the overall strategy for dealing with nonattainment, and EPA's suggestion that these SIP revisions are of little significance would come as quite a surprise to Congress. Far from distinguishing between original and revised SIPs, the legislative history generally emphasizes the need for expeditious action.

[13] The government asserts in its brief that Section 110(g) requires a state to wait for the entire four-month period before declaring the suspension, and that this provision should therefore be regarded as containing an exclusive remedy for EPA's failure to meet that deadline. (U.S. Br. 27). As discussed in General Motors' opening brief, the proper reading of this provision is that a state may declare a suspension at any time within the four-month period following promulgation, unless EPA has exercised its authority to disapprove the revision. (GM Br. 27 n.24.)

[14] EPA also unpersuasively argues that the Court should ignore the

ing proof that the wording of a statute is in fact a mistake, the courts do not—and should not—assume a mistake to exist.

C. The Administrative Procedure Act And EPA's Dilatory Practice Do Not Support EPA's Position That A Review Period of More Than Four Months is "Reasonable."

EPA's final argument in opposition to the four-month rule is that the Administrative Procedure Act only requires the Agency to act "within a reasonable time." 5 U.S.C. § 555. The government's argument is puzzling in view of EPA's position that it is not engaged in rulemaking under the APA in taking action on SIP revisions. 55 Fed. Reg. 5824, 5826 (1990). Moreover, this APA provision cannot override a statutory provision that establishes a specific time period for Agency action. As is discussed at length in General Motors' opening brief (at 15-17, 27-31), the four-month deadline is consistent with the very limited role that Congress intended EPA to play in reviewing SIPs.[15]

The government complains that a four-month deadline for EPA action on SIP revisions is unattainable in most cases, but its argument is self-serving and circular given EPA's refusal to review SIP revisions in the limited man-

four-month language in § 110(g) as an irrelevant statement of intent by a later Congress. (U.S. Br. 19). However, the language that EPA seeks to sweep under the carpet is neither a *post hoc* rationalization buried in the legislative history nor a coincidental wording of an entirely separate statutory provision. The cases cited on this point by the government are clearly distinguishable.

[15] Congress did not want EPA to undertake "micro-management" of the states' implementation policies. EPA has itself admitted that the extreme delays it has experienced in reviewing SIPs and SIP revisions has been the result of the Agency's insistence on such detailed management of the states' implementation requirements, in direct contravention of Congress's intent. EPA has also admitted that these delays "frustrate the development of an optimum state/federal partnership, cause confusion for sources regarding applicable regulations, and generally dampen initiative in state regulatory programs." 55 Fed. Reg. 5824 (1990), *see also* 54 Fed. Reg. 2214, 2216-17 (1989).

ner intended by Congress.[16] EPA's complaints on this subject are thus misdirected. Congress mandated EPA to act within four months. If Congress expected too much of the Agency, it is to Congress that EPA must turn for relief.

II. A BAR ON ENFORCEMENT IS THE REMEDY MOST CONSISTENT WITH THE LANGUAGE AND PURPOSES OF THE STATUTE WHERE EPA HAS FAILED TO ACT ON A SIP REVISION.

EPA's principal argument in opposition to the *American Cyanamid* bar on enforcement is that this remedy is not specifically mentioned in the statute. However, this fact begins rather than ends the discussion. It has long been one of the principal functions of the courts to design remedies, in situations where a statute is silent, in order to achieve a result consistent with the statute. *See, e.g., Moser* v. *United States*, 341 U.S. 41 (1951). This judicial function is especially important where, as here, an agency is invoking the power of the courts to support its own misconduct.

A. The *American Cyanamid* Remedy Is Consistent With The Intent Of Congress.

Contrary to the assertions in the government's brief, the Fifth Circuit in *American Cyanamid* considered both the language and the purposes of the statute very carefully.[17]

[16] It is difficult to understand why an agency with a 1989 budget of $815 million and a permanent staff of over 11,000 cannot act in a timely fashion on an average of nine SIP revisions which may be the subject of enforcement actions. *See* The Budget For Fiscal Year 1991, at A-1033; GM Br. at 25; note 27 below. EPA also makes numerous references in its brief to the requirement of OMB review. Again, however, there is no evidence that OMB is in any way responsible for EPA's delay in this case or as a general matter. *See* 54 Fed. Reg. 2214 (1989).

[17] *See American Cyanamid Co.* v. *EPA*, 810 F.2d 943 (5th Cir. 1987). The government does not suggest in its brief that this is an appropriate case for deference to the agency's interpretation of the statute. No deference can be possible to an agency's view of the appropriate remedy for the agency's own malfeasance. Nor would it be appropriate to defer to EPA's view of the four-month rule, which is a pure question of law

While that court's decision was certainly grounded in "policy" (U.S. Br. 26), the court was seeking to effectuate the policy of the statute itself. The Fifth Circuit recognized that EPA's attempt to pursue enforcement by "pocket veto" of a SIP revision is directly inconsistent with the statute. In rejecting EPA's attempt to proceed in this unlawful manner, the Fifth Circuit sought to foster the fundamental federal-state relationship established in the statute.

The government argues that the EPA should have continued authority to bring an enforcement action despite the pendency of an inconsistent SIP revision, primarily because the existing SIP remains the "applicable implementation plan" until EPA approves a revision and the Act authorizes EPA to enforce the "applicable implementation plan." (U.S. Br. 25). This argument depends upon a mechanistic reading of statutory provisions that do not deal with EPA's failure to comply with its obligation to ensure timely action on the plan selected by the state.

The statute establishes a very carefully balanced structure for the promulgation, review, and enforcement of SIPs. Under this scheme, the last step presupposes the proper completion of the first two steps.[18] Thus, both state promulgation and EPA review must be completed in full accordance with statutory requirements before enforcement is authorized. EPA's failure to review a proposed SIP revision creates a situation where there is no federal-state consensus as to the appropriate emission limits.[19] By pur-

as to which the courts are the proper authority. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446-49 (1987).

[18] For example, the statute does not permit enforcement of a SIP requirement that was not properly promulgated by the state. *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (7th Cir. 1983) (barring enforcement of SIP regulation found by state courts to be void *ab initio*, even though EPA had approved it). Nor may the government enforce a SIP revision that the state has promulgated but EPA has not yet approved. *See* 42 U.S.C. § 7410(d).

[19] As is discussed in detail in the *amicus* brief submitted by the Motor Vehicle Manufacturers Association, *et al.*, this ambiguity, if resolved in

suing an enforcement action before acting on a SIP revision, EPA puts the cart before the horse and frustrates the state's ability to make ongoing policy choices as well as the primary enforcement role of the state.

The government argues that the existing SIP remains the "applicable plan" until EPA approves a revision and that the Act gives EPA authority to enforce the applicable plan, quoting this Court's decision in *Train* v. *NRDC*, 421 U.S. 60 (1975). (U.S. Br. 25). The quotation that the government relies upon deals with a situation, unlike this case, where EPA has finally disapproved a SIP revision. This Court did not consider the effect on EPA enforcement of EPA's delay for years in acting on a SIP revision in the first place. *See id.* at 93 n.28. Neither the *Train* case or the language of the statute can be interpreted reasonably to give EPA a license to negate state SIP decisions through enforcement actions.[20]

B. The First Circuit's Remedy Is Inconsistent With The Statute.

The government claims that the First Circuit's approach is based on the statute, but provides little support for this argument.[21] Moreover, the government's brief fails to con-

the manner advocated by the government here, would lead to results under the statute that Congress plainly did not intend. *See* MVMA Br. 20-27; National Governors' Ass'n. Br. 9.

[20] One of the government's principal arguments against the *American Cyanamid* remedy is that it will encourage sources to obtain frivolous SIP revisions granting last-minute extensions of or exemptions from statutory requirements. Although EPA has made this argument throughout the case, it has yet to identify a single instance where such a frivolous revision has been promulgated and submitted for EPA review.

[21] Section 113(b) of the Act permits the district court, in setting the amount of penalties, to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." 42 U.S.C. § 7413(b). The government asserts that EPA's failure to meet the four-month deadline constitutes one of the "other factors" to which this provision refers. However, the Agency points to no other statutory

front the very serious conflicts between the penalty adjustment remedy and other provisions of the Act. The government points out that any review of the substantive validity of EPA's decision to disapprove a SIP revision is committed by statute to the sole jurisdiction of the court of appeals and *may not be considered* by the district court[22] U.S. Br. at 29 n.32, citing 42 U.S.C. § 7607(b)(1). However, later in its brief, the government states that a district court's assessment of "prejudice" under the penalty reduction approach would necessarily take into account the *approvability* of the SIP revision:

> "Even if a delay was not deliberate, we agree that the source's good faith in complying with a *clearly approvable* SIP revision would be a factor the district court should consider in determining whether to assess penalties. Conversely, if the proposed SIP revision is *clearly deficient*, a source's reliance on it would not warrant a reduction in penalties."

U.S. Br. at 35 n.37 (emphasis added). Yet, according to the government's interpretation of the Clean Air Act, *this is a judgment that the statute expressly forbids the district court to make.*[23] The government's remedy thus presents a major jurisdictional conflict.

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language or legislative history in support of this proposition. The government's argument that the First Circuit's remedy has a more direct statutory basis than that in *Cyanamid* thus rings hollow. *See* U.S. Br. 12-13, 34-35.

[22] Moreover, EPA has always interpreted the administrative penalty provisions of Section 120 of the Act as not permitting any such adjustment. Indeed, in the district court EPA attempted to distinguish this case from *American Cyanamid* (which involved penalties assessed under Section 120) on precisely that ground. *See* EPA Mem. in Opposition to Motion for Summary Judgment at 30-31 (October 23, 1987).

[23] A similar problem would be created if this Court were to conclude, as the government urges, that EPA action on SIP revisions is governed by the "reasonable delay" standard of the APA rather than the four-month rule. The government has successfully argued that under the Clean Air Act, actions for review of the Agency's compliance with the APA may be brought only in the court of appeals. 42 U.S.C. § 7607; *Sierra Club* v. *Thomas*, 828 F.2d 783 (D.C. Cir. 1987).

C. The Fifth Circuit's Approach Is Consistent With This Court's Decision In Brock.

EPA argues that the *American Cyanamid* remedy should be rejected because it is inconsistent with this Court's holding in *Brock* v. *Pierce County*, 476 U.S. 253 (1976). As General Motors discussed in its opening brief, this case is very different from *Brock*, both in terms of the facts at hand and the legal principles to be applied. (GM Br. at 26-27).[24] There is no question in this case of barring EPA from disapproving a SIP revision if EPA has not acted within four months. Instead, the bar prevents EPA from initiating an enforcement action that is inconsistent with that review obligation. Thus, the *American Cyanamid* bar, unlike the one in *Brock*, acts to encourage the agency action (prompt EPA review of SIP revisions) to which the deadline is directed, not to discourage or prevent it. In short, the *American Cyanamid* remedy is fully harmonious with the purposes of the statute and furthers those purposes.[25]

The nature of the interests at stake are very different in *Brock* and this case. In *Brock*, the question was whether the public interest (in the form of public funds) should suffer as a result of the negligence of public officials. Under the Clean Air Act, it is for the *states*, not EPA, to decide in the first instance what the public interest is and how it should be advanced. In this case, Massachusetts decided that the public interest would best be served if General

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[24] In *Brock*, the Court carefully reviewed the statute and legislative history and concluded that a bar on recovery of funds would run directly contrary to Congress's intent in establishing the deadline, namely to encourage the Department to act in response to complaints about program abuses. 476 U.S. at 262, 264-65.

[25] Another important distinction between this case and *Brock* lies in the fact that the failure to meet the deadline in *Brock* was apparently the result of negligence rather than, as here, a deliberate decision by the agency, as a matter of policy, not even to try to meet the deadline. *See* 476 U.S. at 258.

Motors built a new, lower-emitting facility in exchange for an extension in the compliance deadline. A company should be expected to comply with such a state judgment and should not be penalized for doing so.[26]

III. THE FIRST CIRCUIT'S ALTERNATIVE REMEDIES ARE NOT "ADEQUATE".

In addition to actual and potential inconsistencies with the statute, the alternative remedies proffered by the First Circuit are not "adequate" to address the problems that EPA creates by its failure to act upon SIP revisions within four months. As discussed in General Motors' opening brief (at 40-45), actual application of either the Section 304 remedy or the penalty-reduction remedy adopted by the First Circuit would impose tremendous burdens on both EPA and the courts. The government's brief does not address these issues.

Under the First Circuit's approach, any company that finds itself in General Motors' position will be compelled to file a Section 304 action in order to protect itself. Thus, instead of simply being barred from prosecuting a handful of enforcement actions, EPA could find itself defending hundreds of Section 304 actions all across the country.[27] For an Agency that is claiming that its failure to meet the four-month deadline is largely the result of limited resources, such a "remedy" would appear to make the problem worse rather than better.[28]

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[26] *See* National Governors' Ass'n. Br. at 21. In this case, there has never been any real question of an adverse impact on the "public interest" stemming from a bar on EPA enforcement. EPA has never asserted that GM's emissions during the 1985-1987 extension caused any harm to the public. If EPA thought that the public was being harmed, it could have brought a prompt suit for injunctive relief while the old paint shop was still in operation, but did not do so.

[27] General Motors' opening brief presented EPA statistics showing that, of approximately 350 SIP revisions received each year, only *nine* have any potential effect on an enforcement action. (GM Br. 25). The government's brief does not contest the accuracy of these figures. Since affected companies cannot predict which nine are likely targets, all 350 revisions are likely to be the subject of mandamus actions.

[28] Moreover, once the court entered an order requiring EPA to act, there is no assurance that EPA would comply. Experience suggests that it would not. *See, e.g., Natural Resources Defense Council* v. *Thomas*, 705 F. Supp. 1 (D.D.C. 1988); *Sierra Club* v. *Ruckelshaus*, 602 F. Supp. 892 (N.D. Cal. 1984).

Nor should the impact of this remedy on the courts be underestimated. Hundreds of new cases, most of which are necessitated by nothing more than a technical possibility of adverse enforcement action, will hardly be a welcome addition to the already overcrowded dockets of the federal courts. Mandamus, which is an extraordinary remedy, would become the norm.[29] And, as General Motors demonstrated in its opening brief (at 43-44), the issues that the court would have to consider in addressing such an action would inevitably lead to detailed judicial involvement in EPA management policies and the allocation of agency resources, as well as the reasonableness of EPA' delay.[30] Many of the same problems of intrusiveness and wasted resources will arise in application of the First Circuit's penalty-reduction remedy.[31]

The government asserts that an enforcement bar would not further the statutory purpose of supporting the proper balance of state and federal authority, because it might

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[29] In order to make the Section 304 remedy meaningful, the courts would have to give priority to such actions—something that many districts would find it extremely difficult to do. The Sixth Circuit concluded that mandamus is not an effective remedy. *See United States* v. *Alcan Foil Products*, 889 F.2d 1513, 1520-21 (6th Cir. 1989).

[30] Perhaps the most ironic aspect of the government's discussion of "reasonableness" lies in its implicit assertion that EPA's own internal deadline of fourteen months is itself the "reasonable" deadline. (U.S. Br. 23, 44 n.50). In this case, EPA missed this "reasonable" deadline by more than 19 months, taking 33 months to complete its review.

[31] By focusing on penalties rather than EPA's delay, the First Circuit's remedy does nothing to further the Congressional policy to achieve progress on an expeditious basis. Moreover, EPA's pocket veto leaves affected sources in regulatory limbo and prejudices their compliance efforts. Once a company is able to show prejudice as a result of EPA's delay, the focus should be on fairness to the company; the "reasonableness" of EPA's delay is irrelevant at this point. *See* National Governors' Ass'n Br. 21.

lead to "hurried and inflexible decision-making." (U.S. Br. at 33). This argument, of course, boils down to an assertion that the *American Cyanamid* remedy is not a good one because it might work, *i.e.*, because it might force EPA to comply with the statutory deadline. Obviously, the assertion that other remedies for EPA's failure to meet that deadline are better because they are less effective carries little weight.

The government also asserts that the *American Cyanamid* remedy is not necessary to preserve the integrity of, EPA's review process, noting that Congress gave both SIP review and enforcement functions to the Agency. However, Congress did not intend the Agency to manipulate its performance of the former functions in support of the latter.[32] *American Cyanamid* requires EPA to put the horse before the cart, *i.e.*, establish what the applicable SIP regulation is before trying to enforce it.[33]

IV. THE CONCERN OF CERTAIN STATE AMICI WITH THE AMERICAN CYANAMID REMEDY IS MISPLACED.

This Court has received *amicus* briefs from state and local *amicus* parties that take a variety of different positions on the statutory support for and general advisability

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[32] In this case, EPA's review of the SIP revision was inextricably intertwined from the very beginning with its desire to punish General Motors for a violation that, under the SIP revision, would not exist. *See* Hanish memo, n.1 *supra*; pages 2-3 above.

[33] EPA makes much, at several points in its brief, of the fact that a decision had been made at the *staff level* to disapprove the revision before the complaint was filed. (U.S. Br. at 8, 29 n.32). If EPA is suggesting that the staff level decision *was* EPA's decision and that subsequent review at upper levels of EPA management was irrelevant, then it is difficult to see how EPA could possibly justify the fact that the Agency took over a year to complete that allegedly meaningless review. If, on the other hand, this further review had any substantive content to it at all, then the preliminary recommendations of lower-level staff members are essentially inconsequential—except, of course, to the extent that the initiation of this enforcement action inevitably increased the pressure on EPA management to go along with the staff recommendation.

of the *American Cyanamid* remedy. Like all of the lower courts, these state and local *amicus* parties are unanimous in supporting the proposition that the statute does in fact require EPA to act on a SIP revision within four months. Their only disagreement with one another is on the appropriate remedy for EPA's failure to meet this requirement.

The Department of Environmental Quality of the State of Louisiana has expressed the opinion that the *American Cyanamid* remedy best satisfies statutory intent. ("Louisiana Brief"). A second brief was filed by a national coalition of state and local governmental officials, including the National Governors' Association.[34] The Governors' Brief urges that enforcement be permitted *only* if it were found that the SIP revision was not "approvable" and even then only prospectively. As applied in this case, the Governors' remedy, like that of *American Cyanamid*, would bar any penalties against General Motors.[35]

In a separate brief, one group of states has suggested that the First Circuit approach is the preferable one.[36] Brief

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[34] Joining in this brief are the National League of Cities, Council of State Governments, National Association of Counties, National Conference of State Legislatures, U.S. Conference of Mayors, and International City Management Association. ("Governors' Brief"). These officials are involved in the day-to-day implementation of the Clean Air Act across the United States.

[35] Governors' Brief at 20-21. Under the approach in the Governors' Brief, EPA enforcement would be conditioned on a showing by EPA that the SIP version is not approvable under the Act, with the burden of proof on EPA. *Id.* at 7, 19. Where this showing is made, EPA could seek injunctive relief to obtain a schedule of compliance as appropriate. However, the court would be precluded from imposing monetary penalties on a company that has relied in good faith on a state SIP revision. *Id.* As noted by the Governors' Brief, "a source should be expected to comply with the state-approved revision and should not be penalized for doing so." *Id.* at 21.

[36] Indeed, in a footnote on page 20 of its brief, Massachusetts takes a position even more extreme than that of the United States in suggesting that EPA should always be permitted to collect penalties during any period of delay in the Agency's review process, *even if the revision*

for the Commonwealth of Massachusetts, *et al.* ("Massachusetts Brief"). This brief, in which Massachusetts is the lead party, makes the puzzling assertion that an enforcement bar is not in the public interest.[37] Massachusetts, however, does not argue that its SIP revision was not in the best interest of its citizens, since it promulgated the revision in the first place, filed comments with EPA in opposition to the Agency's proposal to disapprove the revision,[38] and *still* believes that the revision was valid and should have been approved.[39]

It is readily apparent that the concerns in the Massachusetts Brief have virtually nothing to do with a state's interests in the process through which its own SIP is promulgated and enforced. Instead, they deal with concerns that arise from potential indirect impacts of *another* state's SIP, such as interstate pollution. The hypothetical interstate concerns addressed in the Massachusetts Brief are addressed in Section 110(a)(2) of the Act, which requires EPA to disapprove any SIP or SIP revision that fails to

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is ultimately approved. Massachusetts does not appear to recognize—and certainly makes no attempt to resolve—the very serious due process concerns that such a rule would create. No court has ever suggested such an illogical result.

[37] The Massachusetts Brief expresses a concern that an enforcement bar might deprive the state proposing the SIP of EPA's guidance concerning attainment of national standards. Obviously, a state's inability to benefit from EPA's assistance in a situation such as this stems not from a bar on retroactive enforcement of the old SIP after EPA disapproves a revision, but from EPA's failure to act on the revision promptly. An enforcement bar will certainly not exacerbate that problem; to the contrary, it should help to solve it by increasing the incentive on EPA to act promptly.

[38] A copy of the Commonwealth's January 2, 1986, letter to EPA on this subject has been lodged with the Clerk of the Court.

[39] *See* Massachusetts Br. at 6, n.3. Given this fact, it is astonishing that Massachusetts characterizes General Motors' reliance upon the revision as constituting a "knowing" violation. *Id.*, at 7, 18, 29. This *non sequitur* suggestion should be rejected out of hand, if for no other reason that it is inconsistent with the actions of Massachusetts in submitting the SIP revision.

make adequate provision against interstate pollution.[40] Where an issue concerning interstate pollution arises, only timely completion of EPA review can properly resolve any conflict between the interest of the state that has promulgated a SIP revision that it believes to be valid and the interest of another state that believes otherwise. Continued EPA authority to take enforcement action against a source that is in compliance with a revised SIP is in direct conflict with the interests of the first state and does little to resolve the concerns of the latter.[41]

By focusing on the harms it fears from the improper action of its sister states, Massachusetts is ignoring the interests that prompted it to adopt the SIP revision in the first place. In essence, it is now telling General Motors that it should not have made a commitment to the Commonwealth to build the new lower-emitting facility.[42] Should the First Circuit's remedy be upheld, that is certainly the message that will be transmitted to industries across the country.[43] As a result, industries will be increasingly un-

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[40] 42 U.S.C. § 7410(a)(2)(E). *See also* 42 U.S.C. § 7426. The Massachusetts brief does not suggest that any such issue is presented in this case.

[41] Massachusetts suggests that a Section 304 action is an adequate remedy where EPA fails to act on a revision in a timely manner. As discussed in General Motors' opening brief (at 42), we believe that this optimism is misplaced. However, if Massachusetts truly believes that a Section 304 action is an acceptable remedy, then it naturally follows that this remedy should also be more than adequate for a state that is concerned with EPA delay.

[42] The government argues that General Motors was not legally *required* to construct the new facility, despite its agreement with the state to do so, and suggests that the company therefore was not faced with a dilemma as to which approach to adopt. (U.S. Br. 37). This distinction is more theoretical than real. The SIP revision was accompanied by a permit containing a construction schedule which was *legally binding* on GM. Moreover, in many cases, SIP revisions adopted to encourage the construction of new facilities and innovative technologies specifically require those actions to be taken. *Cf. General Motors Corp. v. EPA*, 871 F.2d 495, 501 (5th Cir. 1989) (similar dilemma presented where EPA fails to act on a Delayed Compliance Order).

[43] The mere possibility that penalties *might* be reduced based on con-

willing to undertake the development and adoption of new technologies—a result that is plainly at odds with the fundamental purpose of the Clean Air Act.

The Louisiana and Governors' briefs confirm that, from the standpoint of the states and local agencies that are trying to promulgate changes to their own SIPs, the real problem is with EPA's consistent failure to complete its review of SIP revisions in a timely manner.[14] When EPA fails to act and exercises a pocket veto of the revision, its conduct destroys the cooperative federalism intended by Congress. Governors Br. at 15-16. The *American Cyanamid* ban on enforcement is the *only* remedy that is both consistent with the statute and reasonably designed to give effect to these important statutory policies.

CONCLUSION

For the reasons stated above and in General Motors' opening brief, this Court should reverse the decision of the First Circuit and remand with instructions to reinstate the District Court's summary judgment order.

Respectfully submitted,

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sideration of a variety of case-specific circumstances will be cold comfort to companies in such a situation, and few will be willing to take the chance.

[14] As Louisiana points out, prompt EPA action is vital, since it "reduces uncertainty within state environmental agencies, and the industries that they regulate, as to the status of the states' air programs and minimizes the possibility that the states will be unable to take enforcement actions to ensure compliance with their revised (and preferred) means of achieving air quality." (Louisiana Br. 16-17). Louisiana knows whereof it speaks. It was the state whose SIP revision EPA was attempting to disregard in *American Cyanamid*. Today, many years later, EPA has still not acted on that revision.

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No. 89-369

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF LOUISIANA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the Clean Air Act, which requires the Environmental Protection Agency ("EPA") to approve or disapprove a State Implementation Plan ("SIP") within four months of a state's submission of the SIP to EPA, imposes a similar deadline on EPA's consideration of a state's proposed revision of that SIP.

2. Whether EPA, having failed either to approve or disapprove a state's revision to its SIP within four months, may bring an enforcement action on the original SIP before approving or disapproving the revision or may collect penalties relating to the period of its delay.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICUS	1
STATEMENT	2
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. THE CLEAN AIR ACT REQUIRES EPA TO ACT ON SIP REVISIONS WITHIN FOUR MONTHS	9
II. WHEN EPA FAILS EITHER TO APPROVE OR DISAPPROVE A STATE'S SIP REVISION WITHIN FOUR MONTHS, IT IS BARRED FROM BRINGING AN ENFORCEMENT ACTION BEFORE ACTING ON THE PROPOSED REVISION AND MAY NOT COLLECT PENALTIES RELATING TO THE PERIOD OF ITS DELAY	14
A. A Temporary Limitation On EPA's Authority To Enforce An Original SIP, When It Has Failed To Act On A Pending SIP Revision, Comports With Both The Act's Structure And Legislative Purpose	15
B. Neither The United States Nor The Court Below Provides Any Persuasive Reasons For Not Imposing A Temporary Ban On EPA's Enforcement Authority	18
CONCLUSION	24

TABLE OF AUTHORITIES

CASES: Page

American Cyanamid Co. v. EPA, 810 F.2d 493 (5th Cir. 1987) 10, 13, 16
Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028 (7th Cir. 1984) 11
Bowen v. Georgetown University Hospital, 109 S. Ct. 468 (1988) 10
Brock v. Pierce County, 476 U.S. 253 (1986) 17, 18
Concerned Citizens of Bridesburg v. EPA, 836 F.2d 777 (3d Cir. 1987) 11, 13
Council of Commuter Organizations v. Gorsuch, 683 F.2d 648 (2d Cir. 1982) 10
Council of Commuter Organizations v. Thomas, 799 F.2d 879 (2d Cir. 1986) 10
Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983) 10, 13, 20, 21
General Motors Corp. v. EPA, 871 F.2d 495 (5th Cir. 1989) 10
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 10
Public Employees Retirement System v. Betts, 109 S. Ct. 2854 (1989) 9
Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975) 3, 11, 16
Union Electric Co. v. EPA, 427 U.S. 246 (1976) 2, 16
United States v. Alcan Foil Products, No. 88-6300 (6th Cir. Nov. 21, 1989) 10, 20, 21
United States v. National Steel Corp., 767 F.2d 1176 (6th Cir. 1985) 10

STATUTES:

Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (1982) 1
42 U.S.C. § 7407(a) (1982) 2, 11, 15
42 U.S.C. § 7409 (1982) 2, 11
42 U.S.C. § 7409(a) (1) (1982) 12
42 U.S.C. § 7410 (1982) 2
42 U.S.C. § 7410(a) (1) (1982) 2, 12, 19
42 U.S.C. § 7410(a) (2) (1982) 2, 3, 8, 9, 11, 12
42 U.S.C. § 7410(a) (3) (A) (1982) 3, 8, 10, 11
42 U.S.C. § 7410(d) (1982) 17

TABLE OF AUTHORITIES—Continued

Page

42 U.S.C. § 7413 (1982) 3, 14, 21
42 U.S.C. § 7413(a) (1982) 17
42 U.S.C. § 7413(d) (2) (1982) 12
42 U.S.C. § 7502(a) (2) (1982) 4
42 U.S.C. § 7604 (1982) 20
42 U.S.C. § 7604(a) (2) (1982) 7

REGULATIONS:

40 C.F.R. § 51.102 19
310 CMR § 7.18(7) (1979) 4
44 Fed. Reg. 8220 (1979) 3
45 Fed. Reg. 61,293 (1980) 4
45 Fed. Reg. 61,295 (1980) 4
46 Fed. Reg. 51,386 (1981) 4
51 Fed. Reg. 43,394 (1986) 5
51 Fed. Reg. 43,395 (1986) 5
54 Fed. Reg. 2214 (1989) 23

LEGISLATIVE MATERIALS:

S. Rep. No. 1196, 91st Cong., 2d Sess. 21 (1970), *reprinted in* 1 *A Legislative History of the Clean Air Act Amendments of 1970* ("*Legislative History*") 397 (1974) 12
116 Cong. Rec. 33,116-17 (1970), *reprinted in* 1 *Legislative History* 385 12
116 Cong. Rec. 42,382 (1970), *reprinted in* 1 *Legislative History* 127 16
116 Cong. Rec. 42,520 (1970), *reprinted in* 1 *Legislative History* 112 16
H.R. 99, 101st Cong., 1st Sess. § 103 (1989) 23
H.R. 2323, 101st Cong., 1st Sess. § 401 (1989) 24
H.R. 3030, 101st Cong., 1st Sess. § 101(a) (1) (1989) 23, 24
S. 1490, 101st Cong., 1st Sess. § 101(a) (1989) 24

MISCELLANEOUS AUTHORITIES:

1 W. Rodgers, *Environmental Law: Air And Water* § 3.9 (1986) 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-369

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR THE DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF LOUISIANA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICUS [1]

The State of Louisiana, like all other states, has a major role in the regulation of air pollution under the Clean Air Act ("Act"), 42 U.S.C. §§ 7401 *et seq.* (1982). Under the Act, each state has primary responsibility for devising, administering, and, if necessary, revising a State Implementation Plan ("SIP") to achieve the National Ambient Air Quality Standards that the Environmental Protection Agency ("EPA") has established. In Louisiana,

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[1] Counsel for both parties have consented to the filing of this brief. Their consents have been filed with the Clerk of this Court.

that responsibility rests with the Department of Environmental Quality ("DEQ"). Both original SIPs and SIP revisions are subject to EPA approval. This case raises important questions concerning the respective roles of the federal government and the states in the adoption of SIPs: namely, whether EPA must review SIP revisions within the four-month period specified in the Act for review of original SIPs, and what consequences flow from EPA's failure to meet that deadline. The State of Louisiana, through DEQ, has a significant and immediate interest in the resolution of these issues.

STATEMENT

1. The Clean Air Act is a comprehensive statute governing the control of air pollution. Congress amended the Act in 1970, and again in 1977, to create an important partnership between the federal government and the individual states in setting and achieving National Ambient Air Quality Standards throughout the country. The division of authority under the Act is well-defined: the federal government, through EPA, promulgates National Ambient Air Quality Standards on a pollutant-by-pollutant basis; in turn, the states—through agencies such as DEQ—adopt State Implementation Plans ("SIPs") to ensure achievement of those standards within their jurisdictions. *See* 42 U.S.C. §§ 7409, 7410.

The Act expressly gives each state "primary responsibility" for ensuring air quality within its borders. 42 U.S.C. § 7407(a). The Act empowers each state to determine what combination of regulatory requirements will best ensure the attainment of National Ambient Air Quality Standards within its jurisdiction and to design its SIP in a manner that is consistent with the state's political, economic, and social policy concerns. *See, e.g., Union Electric Co. v. EPA*, 427 U.S. 246, 266-67 (1976). Although the state must submit its SIP to EPA for review and approval (42 U.S.C. § 7410(a)(1), (2)), the

Act prohibits EPA from rejecting any SIP that satisfies the Act's substantive and procedural requirements. 42 U.S.C. § 7410(a)(2); *see Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975) (noting that EPA "is *required* to approve a state plan" that will result in the attainment of the National Ambient Air Quality Standards and that meets the other statutory requirements for evaluation of a proposed SIP) (emphasis in original). The Act, moreover, requires EPA either to approve or disapprove a SIP within four months of its submission. 42 U.S.C. § 7410(a)(2). Once EPA approves the SIP, both the state and the federal government have authority to enforce it. The state's enforcement authority derives from its adoption of the SIP through the state's regulatory and legislative process; EPA's authority derives from the Act itself. *See* 42 U.S.C. § 7413.

In enacting the Act, Congress recognized that each state requires the freedom to revise its SIP from time to time to reflect new technology, changes in local needs, or other developments. Consequently, the Act permits a state to revise its SIP at any time it deems appropriate. *See* 42 U.S.C. § 7410(a)(3)(A). As with the original SIP, the Act requires the state to submit any SIP revision to EPA for approval; EPA, however, may not reject a SIP revision if it will result in the attainment of the applicable National Ambient Air Quality Standards and if it meets the other requirements applicable to the evaluation of original SIPs. 42 U.S.C. § 7410(a)(3)(A); *see id.* § 7410(a)(2).

2. General Motors owns and operates an automobile assembly plant in Framingham, Massachusetts that, as a product of its painting operations, emits volatile organic compounds ("VOCs"). In February 1979, EPA promulgated the National Ambient Air Quality Standards for ozone. 44 Fed. Reg. 8220 (1979). Later that year, Massachusetts adopted a proposed SIP limiting VOC emissions from sources in the Framingham, Massachusetts

area (310 CMR § 7.18(7) (1979)), including the painting operations at General Motors' plant. The SIP, which EPA approved in 1980 (45 Fed. Reg. 61,293, 61,295 (1980)), required compliance by December 31, 1985—two years before the Act's December 31, 1987 final compliance deadline for attainment of the national ozone standards. *See* 42 U.S.C. § 7502(a)(2).

On October 20, 1981, EPA published a policy statement advocating deferral of the ozone compliance dates for automobile painting operations. 46 Fed. Reg. 51,386-88 (1981). The policy statement noted that the automobile industry was developing new technology to reduce VOC emissions. Accordingly, EPA concluded that allowing a deferral of compliance would give the industry needed time to develop a more efficient and cost-effective technology. To this end, the policy statement provided that EPA would approve state-submitted revisions of SIPs giving auto makers until 1986 or 1987 to achieve final compliance with the emission limits for painting operations in order to allow for further development of coating technology—provided that the extension did not impact the states' ability to obtain the ambient air quality standards.

In 1984, pursuant to this policy statement, General Motors submitted to Massachusetts a timely request for an extension of the compliance deadline for its Framingham painting operations until December 31, 1987. General Motors based this request on its proposed installation of abatement controls at its then-existing painting facility. Subsequently, General Motors decided to close its existing painting facility and replace it with a new technologically-advanced system designed to achieve substantially lower VOC emissions. On June 7, 1985, General Motors informed Massachusetts of its revised plans and reiterated its request for an extension of the SIP compliance deadline to December 31, 1987. Following a public hearing, which an EPA representative attended, Massachusetts revised its SIP to extend the applicable

compliance deadline to August 31, 1987, a twenty-month extension of the initial state deadline but still several months short of the Act's attainment deadline for ozone. Massachusetts submitted the SIP revision to EPA for approval on December 30, 1985. Pet. App. 6a; Supp. Pet. App. SA-3.

For 33 months, EPA took no final action to approve or disapprove Massachusetts' SIP revision; the compliance deadlines for both the original SIP and SIP revision passed without final EPA action.[2] In the interim, General Motors proceeded with its state-approved compliance strategy. It closed the old Framingham painting facility on schedule and spent over $200 million on the construction of a new facility, using a more effective and environmentally sound painting system. Finally, on September 16, 1988, EPA disapproved the proposed SIP revision. Pet. App. 8a.

3. On August 14, 1986, prior to taking final action on the proposed SIP revision, EPA issued a Notice of Violation to General Motors, asserting that the Framingham painting facility was in violation of Massachusetts' *original* SIP. Supp. Pet. App. SA-4. Thereafter, on August 17, 1987, nearly 20 months after Massachusetts submitted its proposed SIP revision to EPA but still prior to any final action on that revision, EPA filed its complaint in federal district court in Massachusetts. EPA sought civil penalties for the violation of the 1985 deadline in the original SIP.[3]

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[2] On December 2, 1986, EPA issued a Notice of Proposed Rulemaking, stating that it was considering disapproval of the revision. 51 Fed. Reg. 43,394 (1986). It reasoned that "[e]xtensions of the December 31, 1985 date should instead be obtained through an enforcement mechanism," *id.* at 43,395, ignoring the fact that the entire purpose of the revision was to change the 1985 compliance deadline and thereby preclude its enforcement. General Motors and Massachusetts both filed comments in opposition to the proposed disapproval.

[3] In addition, EPA sought injunctive relief even though General Motors had permanently closed the old Framingham paint shop over a month earlier. EPA later withdrew its request for such relief.

4. On May 16, 1988, the district court granted summary judgment to General Motors. The court held that the Act required EPA to act upon Massachusetts' proposed SIP revision within four months and that EPA, having failed to do so, was precluded from enforcing the old SIP until it made a decision on the SIP revision.

The district court found that the application of the four-month limitation to EPA's review of SIP revisions derived support from the "structure" of the statute, which provides for "a cooperative venture in which federal authorities prescribe long-term national standards but allow each state, within limits, to determine the best way to reach them." Supp. Pet. App. SA-4-5. It further found that the application of a four-month SIP review period was appropriate on policy grounds as well. First, the court noted that "EPA always holds the ultimate trump card" because "it may at an[y] time during or after the allowed four-month period reject the proposal and invoke enforcement proceedings under the original SIP." *Id.* at SA-6. Second, the court found that "it strains credulity that truly important or controversial SIP revisions cannot be effectively identified early on in the process and scheduled for expedited review." *Id.* Finally, the court noted that a period longer than four months "would leave both the states and the affected industries in an unjustifiable state of limbo." *Id.* The states "would be unable to act to balance dictated national priorities with the interests of its citizens and industries," and the industries would face the dilemma of "ceasing operations now, or possibly being forced out of business by heavy fines later." *Id.*

The court also addressed the ramifications of EPA's failure to meet the four-month deadline. It held that where, as here, EPA does not render a decision on a proposed SIP revision within four months, it is "prohibited from bringing or continuing enforcement proceedings under the original SIP until final action is taken." Supp. Pet. App. SA-7.

5. EPA appealed the district court's order.[4] On June 7, 1989, the First Circuit reversed the district court and remanded the case for further proceedings. It agreed with the district court that the Act requires EPA to review SIP revisions within four months. Pet. App. 9a-12a. It held, however, that EPA may still bring an enforcement action and collect penalties notwithstanding its failure to act on a proposed revision within that four-month period. The court acknowledged that "Congress clearly was concerned with preserving the states' ability to tailor SIPs to local needs and conditions," *id.* at 11a, and that Congress did not intend "the states' legitimate policy choices to be held hostage to the EPA's schedule." *Id.* at 12a. The court nonetheless held that the district court should not have dismissed EPA's enforcement action. *Id.* at 12a-18a. Rather, the court concluded that, when EPA fails to comply with the four-month period, a "twofold" remedy is available: (1) the affected company may file suit under Section 304(a)(2) of the Act to compel EPA to act, 42 U.S.C. § 7604(a)(2), or (2) at the penalty stage of an enforcement suit, the district court may take into account EPA's delay, and the prejudice that the company suffered as a result, in assessing penalties. Pet. App. 14a-15a. The court noted that the district court's "power to adjust the penalties" will give EPA "the necessary incentive to act without unreasonable delay." *Id.* at 15a-16a.

SUMMARY OF ARGUMENT

I. Under the Clean Air Act, EPA has only four months to approve or disapprove a state's revision of its SIP. This conclusion follows from both the language and structure of the Act. Section 110(a)(2), which governs original SIPs, explicitly provides for a four-month re-

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[4] EPA filed its opening brief on September 16, 1988, the same day that it published its decision disapproving Massachusetts' proposed SIP revision.

view period. 42 U.S.C. § 7410(a)(2). Section 110(a)(3)(A), which governs SIP revisions, specifically incorporates "the requirements" of Section 110(a)(2). 42 U.S.C. § 7410(a)(3)(A). Not surprisingly, every court of appeals to address the issue has concluded that EPA must act on SIP revisions within four months. These courts, like the court below, have so held because a contrary ruling would be inconsistent with the statutory scheme and would have grave policy implications. Absent a four-month rule, EPA would have no incentive to render a timely decision regarding SIP revisions. Contrary to Congress' intent to give states a primary role in the attainment of air quality within their borders, EPA could essentially exercise a "pocket veto" over a state's proposal simply by refusing to take action on the SIP revision.

II. Having correctly concluded that the Act requires EPA to act on a SIP revision within four months, the court below effectively nullified that limitation by holding that EPA can still take enforcement action based on the original SIP, and can still collect noncompliance penalties, even though it fails to adhere to that statutory period. The court below thus refused to adopt a rule imposing a temporary enforcement ban that would preclude EPA from enforcing the original SIP during the pendency of EPA's delay in acting on a SIP revision. It declined to do so even though such a rule properly accommodates the federal-state partnership that Congress created in the Act and effectively advances the Act's purposes of achieving air quality.

There is no merit in any of the reasons advanced against such a temporary enforcement ban. A temporary ban would not, as the United States has suggested, encourage states and industry to submit last-minute SIP revisions to thwart EPA's enforcement authority. Moreover, a less severe remedy would be inadequate to effectuate the Act's purposes. Contrary to the reasoning of the court below, industries do not have effective alternative means of addressing agency delay in the review of SIP revisions that the states deem necessary to achieving air quality within their boundaries. Finally, a temporary enforcement ban is a reasonable consequence of EPA's failure to meet that four-month deadline. Congress explicitly selected that deadline, and EPA is not free to ignore it with impunity.

ARGUMENT

I. THE CLEAN AIR ACT REQUIRES EPA TO ACT ON SIP REVISIONS WITHIN FOUR MONTHS

In defending the First Circuit's judgment, the United States makes the threshold argument that the four-month time period applicable to original SIPs is not applicable to SIP revisions. U.S. Opp. Cert. 8-9. Recognizing that it did not prevail on this point below, the United States advances this argument "as an alternative ground for upholding the court of appeals' judgment." U.S. Opp. Cert. 8 n.1. Both courts below, however, properly rejected this argument. An analysis of the Act's language, structure, and underlying policies amply demonstrates that Congress intended the four-month period to apply to both original SIPs and SIP revisions.

In interpreting a statute, this Court's analysis must "begin, as always, with the language of the statute itself." *Public Employees Retirement System v. Betts*, 109 S. Ct. 2854, 2865 (1989). Section 110(a)(2) of the Act requires EPA to approve, within four months, any SIP that provides for the attainment of the appropriate National Ambient Air Quality Standards and that fulfills certain technical requirements. 42 U.S.C. § 7410(a)(2). Anticipating that the states would have to revise these SIPs periodically, Congress further provided, in Section 110(a)(3)(A) of the Act, that the Administrator of EPA "shall approve any revision of an implementation plan applicable to an air quality control region *if he determines that it meets the requirements of* [*§ 110(a)(2)*] and has been adopted by the State after

reasonable notice and public hearings." 42 U.S.C. § 7410 (a)(3)(A) (emphasis added).[5]

Although Section 110(a)(3)(A), unlike Section 110 (a)(2), does not contain an express deadline for EPA's approval or disapproval of a proposed SIP revision, its incorporation of both the substantive and procedural requirements of Section 110(a)(2) reflects that Congress intended the four-month limitation to apply to SIP revisions as well. Not surprisingly, in addition to the court below, the four other courts of appeals that have faced the question have agreed that the four-month limitation applies to SIP revisions. *See Duquesne Light Co. v. EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983); *Council of Commuter Organizations v. Gorsuch*, 683 F.2d 648, 651-52 n.2 (2d Cir. 1982); *Council of Commuter Organizations v. Thomas*, 799 F.2d 879, 888 (2d Cir. 1986); *American Cyanamid Co. v. EPA*, 810 F.2d 493, 495 (5th Cir. 1987); *General Motors Corp. v. EPA*, 871 F.2d 495, 498 (5th Cir. 1989); *United States v. Alcan Foil Products*, No. 88-6300, slip op. at 8 (6th Cir. Nov. 21, 1989).[6]

[5] The court below correctly held that EPA is not entitled to deference in its interpretation of these statutory provisions. *See* Pet. App. 11a; *accord United States v. Alcan Foil Products*, No. 88-6300, slip op. at 8 (6th Cir. Nov. 21, 1989). This Court has made clear that where, as here, the agency's interpretation of a statute involves a pure question of law, rather than the application of law to facts, it will not accord the agency's interpretation any particular deference. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *cf. Bowen v. Georgetown University Hosp.*, 109 S. Ct. 468, 473 (1988) (refusing to give deference to agency litigation positions that are "wholly unsupported by regulations, rulings or administrative practice").

[6] In its brief in the court below, the United States placed great weight on dicta in a Sixth Circuit opinion, *United States v. National Steel Corp.*, 767 F.2d 1176, 1182-83 n.1 (6th Cir. 1985), in which the court suggested that the four-month limitation does not apply to SIP revisions. The Sixth Circuit, however, recently disavowed that dicta and held—consistent with all other circuits that have faced this issue—that EPA must act on SIP revisions within four months. *See United States v. Alcan Foil Products*, slip op. at 8.

This interpretation fully comports with the structure of the Act. In the Act, Congress established a federal-state cooperative program that requires EPA to set National Ambient Air Quality Standards for particular pollutants. 42 U.S.C. § 7409. The Act, however, vests the states with "the primary responsibility for assuring air quality within the entire geographic area comprising such State." 42 U.S.C. § 7407(a). It gives them wide latitude to "specify the manner in which national primary and secondary ambient air quality standards will be achieved" within their borders. 42 U.S.C. § 7407(a); *see Train v. Natural Resources Defense Council, Inc.*, 421 U.S. at 79. It thus ensures, as the court below noted (Pet. App. 4a), that the states can adopt particular air regulations that address local needs, current technology, and other developments. *See, e.g., Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777, 789 (3d Cir. 1987); *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984).

Consistent with the states' primary role in developing plans to achieve air quality, Congress carefully limited EPA's corresponding role in this process. Of course, the Act does require EPA to review all SIPs. 42 U.S.C. §§ 7410(a)(2) & 7410(a)(3)(A). It makes equally clear, however, that EPA *must* approve a proposed SIP or SIP revision if it satisfies the objective requirements of Section 110(a)(2) of the Act. 42 U.S.C. §§ 7410(a)(2) & 7410(a)(3)(A); *see Train v. Natural Resources Defense Council, Inc.*, 421 U.S. at 79; *Concerned Citizens of Bridesburg v. EPA*, 836 F.2d at 781. Because Congress did not assign EPA a broad policy-making role in the design of SIPs, it had no need to give EPA a lengthy time period for SIP review. A four-month limitation on EPA's review process is, therefore, entirely consistent with the limited and carefully-circumscribed role that EPA plays in the development and approval of SIPs.

A four-month deadline for approval of SIP revisions is likewise consistent with one of the Act's recurrent themes: the need for speedy achievement of National Ambient Air Quality Standards. Congress made abundantly clear its intent that the states, along with EPA, must put SIPs into place as quickly as possible and implement them with dispatch. Thus, Congress gave EPA only 120 days to promulgate National Ambient Air Quality Standards, 42 U.S.C. § 7409(a)(1); it gave states only nine months thereafter to submit their SIPs for approval, *id.* § 7410(a)(1); and it gave EPA only four months after such submissions to approve those plans, *id.* § 7410(a)(2). Moreover, it gave EPA only 90 days to approve or disapprove a state's order delaying the date by which a source must comply with its SIP. 42 U.S.C. § 7413(d)(2). To conclude, as the United States has argued, U.S. Opp. Cert. 9, that a four-month limitation on the approval of SIP revisions is "unwarranted" would plainly contravene Congress' intent to ensure prompt attainment of air quality through effective state plans. *See* S. Rep. No. 1196, 91st Cong., 2d Sess. 21 (1970), *reprinted in* 1 *A Legislative History of the Clean Air Act Amendments of 1970* ("*Legislative History*"), at 414 (1974) ("[i]n order to insure achievement of air quality necessary to protect the health of persons within the period specified in the bill, time constraints would be placed on the [Administrator's] review and approval authority").[7]

The court of appeals' determination that EPA must act on a SIP revision within four months properly effectuates congressional intent and the important policies underlying the Act. Absent a four-month limitation on EPA's review of SIP revisions, EPA would remain free to delay action on those revisions and thus to hold "the states' legitimate policy choices . . . hostage to the EPA's schedule." Pet. App. 12a. Even though a state has proposed a SIP revision that it deems appropriate to effectuate both the Act's purposes and the state's own local interests, EPA can—for any reason or for no reason at all—exercise a "pocket veto" over a state's determination of the proper means to control air emissions merely by delaying action on the SIP revision. This pocket veto expands EPA's review power far beyond its statutory authority by freeing EPA from the standards that Congress imposed under Section 110(a)(3)(A). *Cf. American Cyanamid Co. v. EPA*, 810 F.2d at 495 (noting that EPA "must" approve plans and revisions that satisfy the statutory requirements); *Duquesne Light Co. v. EPA*, 698 F.2d at 471 (noting that EPA is required to approve plans that are adopted after reasonable notice and hearing if they will attain and maintain National Ambient Air Quality Standards). *See also* Pet. App. 10a (discussing "Congress' decision to limit the EPA's discretion to reject a state plan" and holding that "the Act gives the Agency no more discretion to reject a SIP revision than to reject an original SIP"). Certainly, Congress did not intend to grant EPA such a pocket veto and to permit EPA to usurp the states' role as the principal architects of their air quality programs. *See Concerned Citizens of Bridesburg v. EPA*, 836 F.2d at 781.

The threat of lengthy delay, moreover, can only undermine the achievement of better air quality. States have the responsibility to develop new and innovative emission control strategies to reduce air pollutant emissions. To encourage industry to attempt such development, states must be able to revise their air plans to permit the new technology and assure industries that, within a relatively short period of time, EPA will make a final decision on whether the revised plan meets the

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[7] *See also* 116 Cong. Rec. 33,116-17 (Sept. 22, 1970), *reprinted in* 1 *Legislative History*, at 385 (1974) (statement of Sen. Cooper) ("[o]ne of the principal difficulties for the existing law has been the lack of a decisive enforcement authority and the bill before the Senate seeks to streamline and expedite this authority so that procedural delays in enforcement activities do not frustrate the clear intent of the . . . Act").

statutory standards. The absence of a four-month rule would, therefore, discourage industries from taking these innovative approaches, thereby increasing emissions. It would require them to factor the unnecessary uncertainty associated with EPA delay into important decisions about whether to install emission control equipment, what kind of control technology to adopt, and when to install that technology. For example, in the present case, Massachusetts granted General Motors a 20-month extension of the compliance deadline to allow General Motors to develop a new technology to reduce VOC emissions. Had General Motors waited for EPA to act on the proposed revision before investing in this new technology, Massachusetts' goal of reducing emissions would have been seriously undermined.

The absence of a four-month rule would also deprive the states of vital enforcement powers. Under the Act, the states are the primary enforcement authorities of clean air regulations. *See* 42 U.S.C. § 7413. When a state revises its SIP, its old SIP may no longer be a part of its regulations. Additionally, in the absence of EPA approval, the state may be reluctant to bring an enforcement action to compel a company to comply with its new SIP.

In short, the Act's language, structure, and underlying policies strongly support the application of the four-month rule to SIP revisions. For this reason, the Court should affirm this aspect of the decision below.

II. WHEN EPA FAILS EITHER TO APPROVE OR DISAPPROVE A STATE'S SIP REVISION WITHIN FOUR MONTHS, IT IS BARRED FROM BRINGING AN ENFORCEMENT ACTION BEFORE ACTING ON THE PROPOSED REVISION AND MAY NOT COLLECT PENALTIES RELATING TO THE PERIOD OF ITS DELAY

Although the court below correctly held that EPA must act on proposed SIP revisions within four months, its conclusion that EPA's failure to do so does not preclude it from enforcing the original SIP during the period of delay renders the time limitation meaningless. The decision below replaces the strong incentive of an enforcement bar with remedies that provide EPA with far less motivation to act promptly on a state's proposed SIP revision. In so doing, the decision improperly ignores the states' "primary responsibility" for assuring air quality within their borders, *see* 42 U.S.C. § 7407(a), and, accordingly, their vital interests in adopting timely and responsive SIP revisions. Because this approach comports with neither the Act's structure nor its underlying policies, and because it undermines the critical role that the states play under the Act, this Court should not approve it. Rather, this Court should hold that EPA cannot enforce existing SIP provisions or collect penalties for noncompliance during the period of its delay, *i.e.*, from the expiration of the four-month review period until it acts on a proposed SIP revision.

A. A Temporary Limitation On EPA's Authority To Enforce An Original SIP, When It Has Failed To Act On A Pending SIP Revision, Comports With Both The Act's Structure And Legislative Purpose

Neither the language of the Act nor its legislative history answers the second issue in this case: whether, and to what extent, EPA's failure to act on a SIP revision within four months deprives it of enforcement authority during the pendency of its delay. Although the Act's language is silent on this issue, its structure provides persuasive evidence that Congress did not intend to afford EPA unfettered authority to take enforcement actions that are at odds with the states' authority to develop and implement plans to achieve air quality.

This Court has recognized that EPA plays a cooperative, but secondary, "role in the process of determining and enforcing the specific, source-by-source emission limitations" necessary to achieve National Ambient Air Qual-

ity Standards. *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. at 79. Congress vested the states, not EPA, with the authority to develop plans that best address their local interests consistent with the national goal of achieving air quality. *Id*; *Union Electric Co. v. EPA*, 427 U.S. at 266. Congress also contemplated that the states, rather than EPA, would retain primary enforcement authority under their SIPs.[8] For these reasons, "the interest of the state itself is deeply involved in the required four month approval or disapproval of the proposed revision." *American Cyanamid Co. v. EPA*, 810 F.2d at 500.

When a state proposes a SIP revision, it does so because it has concluded that the interests of its residents demand the revision. Under these circumstances, imposing a temporary limitation on EPA's power to enforce a SIP that no longer meets a state's interests plainly comports with the cooperative federal-state relationship that Congress established in the Act. This "bright-line" rule, which the Fifth Circuit adopted in *American Cyanamid*, provides the clearly-defined and effective incentive necessary to ensure that EPA acts promptly to approve or disapprove a state's proposed revision to its SIP. Prompt action reduces uncertainty within state environmental agencies, and the industries that they regulate, as to the status of the states' air programs and minimizes the possibility that the states will be unable to

[8] *See* 116 Cong. Rec. 42,520 (Dec. 18, 1970), *reprinted in* 1 *Legislative History*, at 112 (statement of Rep. Staggers) ("[t]he States on the other hand will have primary responsibility for the enforcement of State plans and the emission limitations provided for in those plans with regard to existing stationary sources"); 116 Cong. Rec. 42,382 (Dec. 18, 1970), *reprinted in* 1 *Legislative History*, at 127 (statement of Sen. Muskie) ("[t]he Senate remains convinced that most effective enforcement of standards would take place on the State and local levels. It was here that the public could participate most actively and bring the most effective pressure to bear for clean air").

take enforcement actions to ensure compliance with their revised (and preferred) means of achieving air quality.

This limitation on EPA's enforcement authority, moreover, accommodates these important state interests without sacrificing the Act's goal of achieving air quality or unduly compromising EPA's enforcement powers. Precluding EPA from enforcing an original SIP between the expiration of the four-month period and the date that it either approves or disapproves the SIP revision—a period that rests completely within EPA's control—is neither extreme nor unreasonable. This enforcement limitation does not mean that the states can transform their revised plans into "applicable implementation plan[s]" without EPA approval. *See* 42 U.S.C. § 7410(d). Nor does this limitation in any way deprive EPA of its ability to enforce the original SIP if it ultimately concludes that the SIP revision does not satisfy the Act's requirements; once EPA reaches such a conclusion, it can freely enforce the provisions of the original SIP. 42 U.S.C. § 7413(a). Although EPA is unable to collect penalties for noncompliance during the period that it delayed a decision on the SIP revision, that result is merely the price of agency delay. More importantly, that price provides the incentive to avoid that delay in the future.[9]

[9] Contrary to the assertion of the United States, U.S. Opp. Cert. 13, an enforcement bar in the circumstances presented here is not inconsistent with *Brock v. Pierce County*, 476 U.S. 253 (1986). In *Pierce County*, this Court allowed the Secretary of Labor to recover misused Comprehensive Employment and Training Act ('CETA") funds notwithstanding the Secretary's failure to make a determination, within the statutorily-mandated time period, that the funds were misused. The party who had misused the funds sought a *permanent ban* of the Secretary's ability to recover the funds, which would have substantially undermined Congress' intent to prevent the misuse of CETA funds. The rule that is advanced here, by contrast, only prevents enforcement of an original SIP during the period in which EPA delays its decision on the SIP revision beyond four months. EPA's regulatory authority is thus left intact, while its

B. Neither The United States Nor The Court Below Provides Any Persuasive Reasons For Not Imposing A Temporary Ban On EPA's Enforcement Authority

The United States and the court below make various arguments to support their position that even a temporary ban on EPA's enforcement authority during the period that EPA fails to act on a SIP revision is improper. These arguments are that such a ban (1) would invite state-industry collusion in the submission of last-minute SIP revisions to stave off EPA enforcement action; (2) is unnecessary because of the availability of other measures to address agency delay; and (3) puts EPA in the position of having to comply with a statutory deadline that it lacks resources to meet. Those arguments do not withstand scrutiny.

1. The United States maintains that a temporary enforcement ban will "encourage industries to propose last-minute SIP revision proposals for the purpose of staying EPA enforcement actions and postponing compliance with SIP provisions." U.S. Opp. Cert. 12. This argument is all but frivolous.[10]

To begin with, the states, not industry, propose SIP revisions. The United States' argument therefore presumes, with no evidence or support, that states will act in bad faith to propose revisions solely for the purpose of undermining EPA's enforcement authority. In other

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enforcement authority is limited only to the extent that it fails to act within the statutory approval period. In short, the approach urged by DEQ reinforces Congress' intent, whereas the position of the defendant in *Pierce County* would have undermined that intent.

[10] EPA also asserts that the enforcement ban will give "noncomplying sources in States that propose revisions . . . unfair advantage over those in other States . . . ." U.S. Opp. Cert. 12. EPA, however, has the option to prevent such "advantage" by acting within four months on the proposed revision. Thus, any advantage is solely the result of EPA's failure to follow the Act.

words, the United States argues that states will improperly approve SIP revisions—regardless of whether such revisions satisfy the states' own interests—in order to undermine enforcement of the Act. EPA cites nothing to show that the states have engaged, or likely would engage, in such behavior.

Moreover, EPA's reference to "last-minute SIP revisions" totally misperceives the states' role in developing such revisions. Under the Act, a state may not submit "eleventh-hour" SIP revisions to EPA at a company's behest. The state must first comply with the Act's mandate that it provide reasonable notice of the SIP and hold public hearings. 42 U.S.C. § 7410(a)(1); 40 C.F.R. § 51.102 (state must conduct one or more public hearings and must provide 30-day notice to, *inter alia*, the public "by prominent advertisement," the Administrator, and each local air pollution control agency that will be significantly impacted). States must also comply with their own statutes and regulatory procedures governing legislation and rulemaking. The process of proposing SIP revisions is thus potentially lengthy and complicated—and is wholly incompatible with hastily-concocted and improperly-motivated SIP revisions. In addition, the mere submission of a proposed SIP revision will not automatically "stay" EPA enforcement actions. Such actions will be stayed or precluded only when, and only to the extent that, EPA fails to approve or disapprove the SIP revision within four months of its submission to EPA.

2. The court below and the United States further contend that companies held hostage to unreasonable agency delay have effective remedies short of a temporary protection from an EPA enforcement action. Pet. App. 14a; U.S. Opp. Cert. 10. They suggest that companies have two remedies: (1) a "company may at any time after the end of the four-month period bring suit in the district court under § 304(a)(2) of the Act to compel agency action," Pet. App. 14a; and (2) if the Section

304 remedy proves unavailing, the district court can "consider the reasonableness of the Agency's delay and the prejudice, if any, suffered by the company" at the penalty stage of a Section 113 proceeding, Pet. App. 15a; U.S. Opp. Cert. 10.[11] This "twofold" remedy, however, is both unworkable and inconsistent with the Act's policies.

As the court below indicated, Pet. App. 14a, companies undoubtedly can file actions to compel agency action under Section 304 of the Act. 42 U.S.C. § 7604. A court, moreover, can plainly "assess the Agency's reasons for not complying with the four-month time limit and take such action as it deems reasonable" in the context of a Section 304 action. Pet. App. 14a. But attempting to prevent agency delay with a suit to compel agency action under Section 304, at bottom, requires companies to divert valuable resources to fund entirely preventable and thus needless litigation. A final judicial determination that EPA has unduly delayed action, perhaps years after the submission of a SIP revision, would cost substantial time and money and would do little to enhance either EPA's efficiency or the states' interests in SIP adoption. Moreover, during the action, penalties could continue to accrue. It is hardly surprising, therefore, that the Sixth Circuit recently recognized that the remedy of a suit to compel EPA to act "is not very effective." *United States*

[11] In so concluding, the court eliminated a third potential remedy that the D.C. Circuit adopted in *Duquesne Light Co. v. EPA*, 698 F.2d 456. In that case, the court concluded that, in cases of agency delay, the penalty should be held in abeyance pending the agency's final decision on the proposed revision. If the revision is ultimately rejected, penalties may be assessed retroactively, with interest, for the entire period after the deadline. *Id.* at 472. The court below correctly determined that the D.C. Circuit's approach is "extreme"; it "gives the Agency little or no incentive to conclude its review within the statutory time limit because, no matter how long the Agency procrastinates, it knows that it may collect full penalties if the revision is ultimately rejected." Pet. App. 12a-13a.

v. Alcan Foil Products, slip op. at 14; *see also Duquesne Light Co. v. EPA*, 698 F.2d at 472 (section 304(a) does not "act as a full safeguard").

Seeking redress for agency delay pursuant to a Section 113 penalty proceeding is a similarly inadequate remedy. 42 U.S.C. § 7413. Of course, as the court below noted, the Act expressly permits a court, at the penalty stage, to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation," Pet. App. 15a; the "other factors," according to the court, include the reasonableness of the agency's delay. *Id.* The fact that agency delay would be a "factor" at a penalty proceeding, however, where the focus of the proceeding would be on industry rather than agency noncompliance, provides little assurance that courts will consider such delay more than superficially, if at all.[12] Thus, this redress provides little comfort to a company trying to determine whether it can follow a proposed SIP revision in the face of EPA inaction. More fundamentally, the equitable approach, which focuses on the harm suffered by industry as a result of EPA's delay, does nothing to address the harm suffered by the state in being unable to carry out its public policy. In short, such recourse does little to address the states' interests in gaining prompt review of SIP revisions.

Moreover, the "twofold" remedy that the court below advances will needlessly result in costly litigation for all involved parties. Because this approach allows an enforcement action prior to final EPA action with respect to a proposed SIP revision, it could allow EPA to pursue an enforcement proceeding before an administrative law

[12] Indeed, even after the decision below, judges have struggled with the parameters of these various factors and their usefulness in addressing agency delay in acting on SIP revisions. *Compare United States v. Alcan Foil Products*, slip op. at 14-15 (majority opinion), *with id.* at 17-19 (concurring opinion).

judge, the Administrator, and a federal court without determining whether the defendant was acting in conformity with a revised state plan that ensures the achievement of National Ambient Air Quality Standards. If, after all of these proceedings, EPA were to approve the state's revisions, the enforcement actions would have wasted the resources of the state, the federal government, and the defendant company. In addition, if penalties were collected and the proposal later approved, the defendant would have been penalized for following a course of conduct that EPA ultimately determined would result in the attainment of all relevant National Ambient Air Quality Standards.

Also, during the enforcement proceeding, instead of focusing on the importance of acting on SIP revisions within four months, EPA will spend countless hours and resources defending the reasonableness of its delay. Similarly, instead of focusing on the achievement of air quality through new technologies and cooperative state-industry ventures, industry will spend valuable time and money attempting to prove unreasonable agency delay and, thereby, reduce any penalties assessed against it under Section 113. Finally, the courts will devote enormous resources in adjudicating these disputes and developing appropriate standards to guide review of agency delay in these contexts. Adopting a "bright-line" rule that imposes a temporary ban on EPA's enforcement authority prevents this needless waste of agency, judicial, and industry resources.

3. Finally, the United States argues, U.S. Opp. Cert. 9, that a temporary enforcement ban is improper because EPA cannot comply with the statutory four-month review period given its large SIP revision workload. That argument completely misperceives the nature of EPA's statutory mandate.

The Act plainly contemplates that the primary burden of developing SIPs, including priority reviews, drafting

of plans, and public comment and hearings, rests with the states. The states, therefore, must invest substantial resources and time commitments to this task even before EPA becomes involved. By contrast, EPA's task is more limited. Congress expressly articulated the criteria that EPA must consider in reviewing SIPs and, significantly, deemed four months to be adequate time for EPA to do so. *See* 1 W. Rodgers, *Environmental Law: Air and Water* § 3.9, at 257 (1986) (noting that the principal reason for restricting procedural rights before EPA "is that ostensibly action must be taken quickly under the statutory scheme: The Administrator has only four months to approve or disapprove a submitted plan"). That EPA has the capacity to act more promptly is evidenced by its recent promulgation of procedures that are intended to enable it to do precisely that. *See* 54 Fed. Reg. 2214 (1989) (identifying "fundamental problems" with its approval process and adopting changes to make review faster and more efficient); U.S. Opp. Cert. 15-16 n.7 (noting that regulatory changes "should result in more expeditious decisions on SIP revision proposals").

In any event, EPA's limited resources do not justify its disregard of a statutory mandate to review SIP revisions within four months. To be sure, like each partner state, EPA confronts daily the task of allocating limited resources to various agency priorities. But, in Section 110 (a), Congress set a priority that EPA is not free to ignore: EPA must approve or disapprove SIPs and SIP revisions within four months. To the extent that EPA disagrees with that priority, for whatever reason, it must direct that concern to Congress.[13] EPA cannot simply ig-

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[13] Indeed, as the United States itself notes, U.S. Opp. Cert. 14 n.5, Congress is currently considering three bills that would amend the Act to require EPA, as a general matter, to act on a SIP revision within twelve months. *See* H.R. 99, 101st Cong., 1st Sess. § 103 (1989); H.R. 3030, 101st Cong., 1st Sess. § 101(a)(1) (adding

nore Congress' four-month limitation and force the states and the industries that they regulate to live with the day-to-day consequences of its delay.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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§ 110(e)(2) to the Act) (1989); S. 1490, 101st Cong., 1st Sess. § 101(a) (adding § 110(e)(2) to the Act) (1989). Another pending bill would allow EPA nine months to act on certain SIP provisions. H.R. 2323, 101st Cong., 1st Sess. § 401 (1989).

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No. 89-369

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OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,
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UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
STATEMENT	3
A. The General Motors Case	3
1. The District Court Decision	4
2. The First Circuit Decision	5
B. The Alcan Case	8
1. The District Court Decision	10
2. The Sixth Circuit Decision	11
SUMMARY OF ARGUMENT	12
ARGUMENT	13
I. EPA ENFORCEMENT AGAINST COMPANIES IN COMPLIANCE WITH STATE-APPROVED SIP REVISIONS DISTORTS THE STATUTORY SCHEME OF THE CLEAN AIR ACT	13
A. The Clean Air Act Vests The States With The Right To Make Source Emission Selections	14
B. EPA Usurps The Rightful Role Of The States Every Time It Delays Review Beyond The Four-Month Period	16
II. THE COURT SHOULD PROTECT COMPANIES FROM THE REGULATORY LIMBO EPA'S DELAY CREATES BY PROHIBITING ENFORCEMENT UNTIL EPA ACTS ON THE SIP REVISION	17
A. The Remedies Proposed By The First Circuit Are An Ineffective Panacea For EPA Delay	18

TABLE OF CONTENTS—Continued

	Page
1. Mandamus Does Not Work	19
2. Penalty Reductions Do Not Adequately Protect Companies From EPA Delay	20
B. Barring Enforcement Until EPA Acts On The SIP Revision Is The Only Equitable Remedy For EPA Delay	22
CONCLUSION	24

TABLE OF AUTHORITIES

CASES:	Page
Air Pollution Control District of Jefferson County, Kentucky v. *EPA*, No. C-86-0519-L-B (W.D. Ky. 1986)	8, 19
American Cyanamid Co. v. *EPA*, 810 F.2d 493 (5th Cir. 1987)	*passim*
Brock v. *Pierce County*, 476 U.S. 253 (1986)	11
Chevron U.S.A., Inc. v. *Natural Resources Defense Council*, 467 U.S. 837 (1984)	8
Council of Commuter Organizations v. *Gorsuch*, 683 F.2d 648 (2d Cir. 1982)	16
Council of Commuter Organizations v. *Thomas*, 799 F.2d 879 (2d Cir. 1986)	16
Dusquense Light Co. v. *EPA*, 698 F.2d 456 (D.C. Cir. 1983)	6, 7, 16, 22
General Motors Corp. v. *United States*, 871 F.2d 495 (5th Cir. 1989)	8
Train v. *Natural Resources Defense Council*, 421 U.S. 60 (1975)	14
United States v. *Alcan Foil Products, Division of Alcan Aluminum Corporation*, No. 88-6300 (6th Cir. Nov. 21, 1989)	*passim*
United States v. *Alcan Foil Products, Division of Alcan Aluminum Corp.*, 694 F. Supp. 1280 (W.D. Ky. 1988)	5, 10, 11
United States v. *General Dynamics Corporation*, Civil Action No. CA4 87 31K (N.D. Tex. filed July 28, 1987)	3
United States v. *General Motors Corp.*, 876 F.2d 1060 (1st Cir. 1989)	*passim*
United States v. *General Motors Corp.*, No. 87-2068-MC (D. Mass. May 16, 1988)	5, 6, 20
United States v. *National Steel Corp.*, 767 F.2d 1176 (6th Cir. 1985)	11, 16
STATUTES:	
Clean Air Act, 42 U.S.C. § 7401 *et seq.*	2
Section 107(a), U.S.C. § 7407(a)	14
Section 110(a)(1), U.S.C. § 7410(a)(1)	2
Section 110(a)(2), U.S.C. § 7410(a)(2)	2, 4, 5, 15

TABLE OF AUTHORITIES—Continued

	Page
Section 110(a)(2)(A), U.S.C. § 7410(a)(2)(A)	15
Section 110(a)(2)(B), U.S.C. § 7410(a)(2)(B)	15
Section 110(a)(3)(A), U.S.C. § 7410(a)(3)(A)	2, 14, 15, 16
Section 110(g)(1), U.S.C. § 7410(g)(1)	16
Section 113(a)(1), U.S.C. § 7413(a)(1)	9
Section 113(b), U.S.C. § 7413(b)	7, 20
Section 113(c)(1), U.S.C. § 7413(c)(1)	18
Section 304(a)(2), U.S.C. § 7604(a)(2)	7, 12, 18, 19
MISCELLANEOUS MATERIALS:	
46 Fed. Reg. 51386 (1981)	4
51 Fed. Reg. 43814 (1986)	15
51 Fed. Reg. 43831 (1986)	15
53 Fed. Reg. 40745 (1988)	10
54 Fed. Reg. 10982 (1989)	10
Review of EPA's Process for Approving/Disapproving State Implementation Plans and Revisions, Office of the Inspector General, U.S. Environmental Protection Agency (March 1989)	18

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

With the written consent of the parties, the Chamber of Commerce of the United States ("the Chamber") respectfully submits this brief *amicus curiae* in support of the Petitioner.[1] The Chamber is the nation's largest federation of business and professional organizations. Its membership includes more than 180,000 companies, partnerships and proprietorships, as well as several thousand trade and professional associations and state and local chambers of commerce. The Chamber regularly presents

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[1] Consent letters have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

the views of its members before this Court on issues of national concern to the business community. The Chamber submitted a brief *amicus curiae* in support of General Motor's *Petition for Certiorari* in this environmental case.

This case presents the Court with two important issues regarding the implementation and enforcement of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* The first issue concerns the deadline for review by the Environmental Protection Agency ("EPA") of revisions to State Implementation Plans ("SIPs")[2] submitted pursuant to § 110 (a)(3)(A) of the Act. 42 U.S.C. § 7410(a)(3)(A). The second issue concerns the consequences of EPA's failure to meet the four-month deadline. Both issues are of great concern to the Chamber and its members, many of which are regulated under the Clean Air Act and adversely affected by the climate of regulatory uncertainty caused by EPA's protracted delay in reviewing SIP revisions.

In the case below, the U.S. Court of Appeals for the First Circuit agreed with the district court—and with every other circuit court to have ruled on the issue—that the Clean Air Act imposes a four-month deadline on EPA to approve or deny SIP revisions. The Chamber supports that ruling, but is deeply troubled by the two "remedies" proposed by the First Circuit for EPA's failure to act within the four-month period.

The Chamber does not believe that either filing a mandamus action to compel timely EPA review or requesting the trial court to reduce the amount of penalties for prejudicial delay adequately protects companies

[2] As part of the states' primary responsibility to assure air quality, the Clean Air Act requires each state to establish its own plan for implementing, maintaining and enforcing national air quality standards. 42 U.S.C. § 7410(a)(1). After formal adoption, the state must submit the plan to EPA, which is required to approve or disapprove it within four months. 42 U.S.C. § 7410(a)(2).

from the regulatory limbo EPA creates every time it fails to act on a SIP revision. Nor do these "remedies" adequately address what the Chamber perceives as the *real* reason behind the delay: EPA's fundamental dissatisfaction with the secondary role Congress has assigned it in reviewing SIP revisions.

General Motor's experience in this case is not the first instance of an EPA attempt to usurp the primary responsibility of the states to make source emission selections under the Clean Air Act. Other Chamber members have had similar experiences as "innocent bystanders" in regulatory disputes between EPA and the state charged by statute to assure the attainment of air quality goals.[3] A classic example is the company's experience in *United States* v. *Alcan Foil Products, Division of Alcan Aluminum Corporation*, No. 88-6300, (6th Cir. Nov. 21, 1989), a case involving Kentucky's attempt to obtain EPA approval of three proposed SIP revisions. To provide this Court with information not brought to its attention by the parties, the Chamber's brief will illustrate—by means of the Alcan experience—how the remedies proposed by the First Circuit in the case below fail to protect companies from EPA's recurring efforts to deprive the states of their rightful role under the Clean Air Act.

STATEMENT

A. The General Motors Case

The General Motors case arises out of an attempt by the Commonwealth of Massachusetts to revise the Clean Air Act compliance dates contained in its state implementation plan ("SIP") for meeting certain air emission

[3] *See, e.g., United States of America* v. *General Dynamics Corporation*, No. CA4 87 31K (N.D. Tex. filed July 28, 1987), involving a dispute between EPA and the state over an interpretation of certain environmental standards contained in Texas' SIP. In this enforcement action, EPA sued General Dynamics for noncompliance with the SIP, despite assurances of full compliance from the state.

limits for volatile organic compounds ("VOCs"). The original SIP contained a compliance date of December 31, 1985.

In October 1981, however, the Environmental Protection Agency ("EPA") issued a policy statement supporting SIP revisions to extend certain compliance dates for automobile paint shop operations. 46 Fed. Reg. 51386 (1981). The purpose of the policy was to lighten the regulatory burden on the automobile industry by encouraging the use of more cost-effective ways to reduce VOC emissions. *Id.*

Under a revised SIP, General Motors would be able to continue operating the existing paint shop of its Framingham, Massachusetts automobile assembly plant while it constructed a new paint facility. At a cost of $200 million, the new facility would use advanced technology to achieve lower VOC emissions, as well as lower VOC-content paint.

Consistent with the EPA policy statement, Massachusetts extended General Motor's compliance date to August 31, 1987, and submitted the proposed SIP revision for EPA review on December 30, 1985. On July 7, 1987, more than a month ahead of schedule, General Motors permanently shut down the old paint shop.

Instead of promptly reviewing the SIP revision, EPA filed an enforcement action against General Motors in district court for noncompliance with the original SIP. At the time the complaint was filed, the paint shop had been closed for a month. The SIP revision, on the other hand, had been pending for nearly two years. Yet EPA did not choose to act on it for more than a year afterwards, finally rejecting it the same day it filed its brief in the First Circuit.

1. *The District Court Decision*

The district court rejected EPA's argument that the four-month rule contained in § 110(a)(2) of the Clean

Air Act does not apply to SIP revisions,[4] and granted General Motor's motion for summary judgment. *United States* v. *General Motors Corp.*, No. 87-2068-MC (D. Mass. May 16, 1988), *see* Supp. App. at SA-4. For authority, the district court cited the rule in *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (5th Cir. 1987), which invalidated a nearly identical enforcement action because of EPA failure to act on a SIP revision within four months.[5]

In *American Cyanamid*, the Fifth Circuit prohibited EPA from enforcing the original SIP until it rejected the proposed revision. *Id.* at 501. The Fifth Circuit held that "EPA may not collect a penalty for the period between (1) four months after a state submits a proposed revision and (2) the date the EPA finally rejects that revision." *Id.* at 500. As a "critical element"[6] of its decision to bar enforcement pending final action, the *Cyanamid* court focused on the state's interest in prompt EPA review of a SIP revision "which clearly authorizes local businesses to act in accordance with it without running afoul of the Clean Air Act." *Id.* at 500. The Fifth

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[4] Section 110(a)(2) requires EPA to approve or deny state implementation plans within four months of submission. 42 U.S.C. § 7410(a)(2). EPA argued that the four-month rule applied only to its review of initial SIP submissions.

[5] The district court also cited the lower court opinion in the *Alcan* case which, at the time, was the most recent decision on the consequences of EPA failure to review SIP revisions within the four-month period. *United States* v. *Alcan Foil Products, Division of Alcan Aluminum Corp.*, 694 F. Supp. 1280 (W.D. Kentucky 1988). The Sixth Circuit reversed this decision in part on November 21, 1989. *United States* v. *Alcan Foil Products Division of Alcan Aluminum*, No. 88-6300, slip op. As noted below, the appeals court upheld the application of the four-month rule to SIP revisions, but refused to bar enforcement pending final action. The Sixth Circuit also refused to endorse mandamus actions as an effective remedy for EPA delay. *See infra* text accompanying notes 29-30.

[6] *Id.* at 499.

Circuit believed that without the protection of an enforcement bar, "American Cyanamid and similarly situated individuals and companies [would be exposed] to the unacceptable risk that, contrary to state policy decisions authorized under the Act, they will be fined because of delays within EPA." *Id.* at 501.

The district court below was equally disturbed by the "unjustifiable state of limbo" [7] unlimited EPA review creates for both the states that propose SIP revisions and the companies that comply with them.

> For an indefinite period, the state would be unable to act to balance dictated national priorities with the interests of its citizens and industries as the Clean Air Act intended. And the industries themselves, though fully in compliance with state law, would face the Scylla and Charybdis choice between ceasing operations now, or possibly being forced out of business by heavy fines later.

General Motors, SA-4. According to the district court, Congress did not intend to "put all the cards in federal hands." *Id.* at SA-5.

2. *The First Circuit Decision*

The U.S. Court of Appeals for the First Circuit upheld the four-month deadline for EPA review of SIP revisions, but rejected the *American Cyanamid* rule as "too drastic" a remedy for EPA delay. *United States* v. *General Motors Corp.*, 876 F.2d 1060 (1st Cir. 1988); App. at 14a. The First Circuit expressed concern that prohibiting enforcement pending EPA action on a SIP revision would hurt only the public. *Id.*

The First Circuit also rejected the deferred penalty approach in *Dusquense Light Co.* v. *EPA*, 698 F.2d 456

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[7] *General Motors* at SA-6.

(D.C. Cir. 1983), as encouraging denials and providing too little incentive for timely action.[8]

In an effort to forge a middle ground, the First Circuit suggested a two-part remedy for EPA delay. First, a company adversely affected by EPA's failure to meet the four month deadline could sue EPA in district court under § 304(a)(2) of the Act to compel agency action any time after the four-month review period has expired.[9] Under this approach, the district court would then "evaluate the circumstances of each case, with the failure to observe the four-month deadline being one factor to consider—a rough guidepost." App. at 15a.

Secondly, the First Circuit suggested that companies could apply for relief under § 113(b) of the Act, which requires trial courts in enforcement actions to calculate penalties by "tak[ing] into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." 42 U.S.C. § 7413(b). According to the First Circuit, this provision authorizes trial courts to reduce penalties according to the "reasonableness of the Agency's delay and the prejudice, if any, suffered by the company as a result" [10] of enforcing an old SIP while a SIP revision is still pending. A variation of this remedy was endorsed by the Sixth Circuit in *Alcan*.

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[8] *Dusquense* allows EPA to enforce an old SIP pending review of a SIP revision, but holds penalties in abeyance until final action. The amount of penalties increase the longer EPA takes to deny a revision, since penalties are calculated back to the four-month deadline upon denial but no penalties are assessed if approved.

[9] 42 U.S.C. § 7604(a)(2). Under this section "any person may commence a civil action . . . against the Administrator [for] failure . . . to perform any act or duty under this chapter which is not discretionary . . . ."

[10] App. at 15a.

B. The Alcan Case

The Alcan case involves Kentucky's attempt to obtain EPA review of three SIP revisions submitted over the course of nearly a decade. These revisions critically affect the operation of Alcan's laminating facility in Louisville, Kentucky, an independent economic unit of the company's Foil Products Division.

Kentucky submitted the first SIP revision (SIP I) to EPA on behalf of the local air pollution control authority—the Air Pollution Control District of Jefferson County ("Jefferson County")—on July 19, 1982. This revision authorized Jefferson County to issue permits for "emission trading" pursuant to the so-called "bubble" concept of air pollution control.[11] At the time of submission, the laminating facility was owned by the Atlantic Richfield Company ("ARCO").

On January 19, 1985, ARCO sold the marginally profitable facility to Alcan, which planned on operating it under the state-authorized bubble. Brief for Defendant at 3, *United States* v. *Alcan Foil Products, Division of Alcan Aluminum Corp.*, No. 88-6300 (6th Cir. Nov. 21, 1989). Shortly after acquiring the facility, however, Alcan discovered that the SIP I revision was the subject of an ongoing dispute between EPA and Jefferson County.[12]

[11] The "bubble" concept controls air emissions on a facility-wide basis. Specifically, it treats all the pollution-emitting devices in the facility as if encased in a bubble. Thus, a company can "offset" noncompliance at one source of pollution in the facility with "emission credits" earned from supercompliance at another source. "Bubbling" has been viewed by many commentators as a "superior long-term strategy for reducing overall emissions." *See, e.g., Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 n.37 (1984); *General Motors Corp.* v. *EPA*, 871 F.2d 495, 500 (5th Cir. 1989).

[12] This dispute ultimately resulted in a lawsuit filed by Jefferson County against EPA to compel agency action on the SIP I revision. *See Air Pollution Control District of Jefferson County, Kentucky* v. *EPA*, No. C-86-0519-L-B (W.D. Ky. 1986). This case has been pending for four years.

As a result of this dispute, EPA had never ruled on Kentucky's proposed revision. Moreover, since the original SIP did not permit use of the bubble concept, EPA had taken the position that both ARCO and Alcan had violated the Clean Air Act, even though each company had operated the plant in full compliance with the SIP I revision.

To avoid becoming an "innocent bystander" of the controversy between EPA and the local air pollution control authority, Alcan requested a source-specific revision (SIP II) to allow the laminating plant to continue operating under the bubble. Without a bubble, the plant would be totally uneconomic and Alcan would have to shut it down.[13] Kentucky submitted the SIP II revision to EPA for review on March 3, 1986.

On July 14, 1986, EPA issued Alcan a notice of noncompliance with the original SIP,[14] despite the fact that the SIP II revision had been pending for more than four months. Rather than approve the SIP II revision as being consistent with applicable law at the time, EPA delayed an additional five months (until December 4, 1986) to revise the procedures and criteria for approving bubble plans.[15] On February 18, 1987, EPA staff informally notified Alcan that the SIP II revision failed to meet the new emission trading policy, and would need to be revised. No formal action was taken to deny the revision at that time.

Instead, on July 15, 1987, EPA filed an enforcement action against Alcan in district court for noncompliance

[13] It would have cost Alcan three times the net profits earned in 1989 to upgrade the laminating facility to meet point-source compliance. Moreover, it would have cost an additional 25% of Alcan's 1989 net profits to operate the upgraded facility each year.

[14] The notice, issued under § 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1), is a jurisdictional prerequisite to filing a federal enforcement action. If the violation continues beyond 30 days, EPA can either issue a compliance order or file a civil action.

[15] *See infra* note 24.

with the original SIP. EPA finally denied the SIP II revision on March 16, 1989,[16] more than three years after submission. EPA has yet to act on the revision to SIP I, with which Alcan has complied in full ever since it took over the laminating plant in 1985. A request for a third SIP revision (SIP III) is now pending before Jefferson County, as part of Alcan's latest effort to obtain final action on the bubble proposal which has been lingering before EPA for nearly a decade.

1. *The District Court Decision*

Invoking the *American Cyanamid* rule, the district court granted Alcan's motion for summary judgment. *United States* v. *Alcan Foil Products, Division of Alcan Aluminum Corp.*, 694 F. Supp. 1280, 1283 (W.D. Ky. 1988). In so doing, it upheld the four-month rule and prohibited EPA from enforcing the original SIP until it acted on the SIP II revision.[17] As did the lower court in the *General Motors* case, the district court here emphasized the important role the state plays in defining authorized emissions. The court also noted the logical corollary of that role, that is—the "state of regulatory limbo" EPA creates for companies operating in compliance with revised SIPs.

> Due to its inaction on the proposed [SIP II] revision, the EPA may not bring an enforcement action against Alcan under the existing [SIP] *since Alcan has been operating in reliance upon assurances by [Jefferson County] that its emissions are acceptable and in compliance with the proposed [SIP II] revision.* The EPA may not seek to enforce the standards of the proposed [SIP II] revision since it failed to take any action on the proposal. *This regulatory quandry is of EPA's own making.*

694 F. Supp. at 1284 (emphasis added).

[16] The Sixth Circuit erroneously stated that EPA disapproved the revision on October 18, 1988. *United States* v. *Alcan Foil Products, Division of Alcan Aluminum Corp.*, No. 88-6300, slip op. at 5 (Nov. 21, 1989). EPA only *proposed* to disapprove the revision on that date. 53 Fed. Reg. 40745. It did not take *final* action until five months later. 54 Fed. Reg. 10982.

[17] The district court did not mention EPA's failure to act on the March 3, 1982, revision to SIP I. Nor did EPA refer to the SIP I revision in its statement of facts.

2. *The Sixth Circuit Decision*

The U.S. Court of Appeals for the Sixth Circuit affirmed the application of the four-month rule to SIP revisions,[18] but disagreed with the lower court on the consequences of EPA delay. *United States* v. *Alcan Foil Products, Division of Alcan Aluminum Corp.*, No. 88-6300, slip op. (6th Cir. Nov. 21, 1989). Like the First Circuit in *General Motors*, the Sixth Circuit found dismissal a "drastic" remedy for EPA's failure to act within four months.[19] Slip op. at 14. The Sixth Circuit disagreed with the First Circuit, however, on the effectiveness of mandamus actions under § 304(a), citing Jefferson County's failed attempt to compel EPA action on the SIP I revision.[20] It proposed instead that trial courts in enforcement actions weigh the reasonableness of EPA's delay against the prejudice suffered by the company by means of a balancing test that places the burden of proof

[18] The Sixth Circuit characterized as "arguably dicta" contradictory language in *United States* v. *National Steel Corp.*, 767 F.2d 1176 (6th Cir. 1985) which suggested that the four-month rule did not apply to SIP revisions. The courts of appeals are now in complete agreement regarding the four-month deadline for EPA review of SIP revisions. *See infra* note 25.

[19] Citing *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986), the Sixth Circuit also expressed concern about treating statutory time periods as jurisdictional, "especially when important public rights are at stake." Slip op. at 13. This concern ignores the fact that the states are not only responsible for assuring attainment of air quality goals, but also are better able to determine the best interests of their citizens.

[20] *See supra* note 12.

on EPA to justify its failure to comply with the statutory four-month period.

SUMMARY OF ARGUMENT

Companies subject to SIP requirements need to know on a timely basis whether a revision proposed by the state will be approved or denied. In the *General Motors* case below, EPA took nearly three years to deny the SIP revision proposed by Massachusetts. By that time, EPA had already filed an appellate brief in an enforcement action brought against the company for noncompliance with the original SIP.

In the *Alcan* case—which involves three proposed revisions to Kentucky's clean air program—EPA never even acted on the first revision that was submitted for review nearly ten years ago. In an effort to eliminate the uncertainty created by EPA's failure to act on that revision, the state submitted a second revision specifically addressing Alcan's problem. EPA took more than three years to review the second revision—finally rejecting it only after the trial court dismissed an enforcement action against Alcan for failing to comply with the original SIP. As grounds for the rejection, EPA cited a new policy that did not exist at the time of submission.

As a remedy for EPA's protracted delay in reviewing SIP revisions, the First Circuit has suggested that companies either file a mandamus action under § 304(a)(2) of the Act[21] to compel EPA review or move the trial court in an enforcement action to reduce penalties for prejudicial delay. Alcan's experience, however, proves both options to be an ineffective panacea for EPA's failure to act.

In the *Alcan* case, a mandamus action filed by the local pollution control district failed to compel EPA to review the SIP I revision. It is doubtful that a different result

[21] 42 U.S.C. § 7604(a)(2).

would have obtained if a similar action had been filed by Alcan instead. Moreover, with civil penalties of $25,000 per day, it is economically impractical for *any* company to risk filing time-consuming mandamus actions against EPA, and thereby subject itself to potentially enormous fines as well as unnecessary litigation expenses. This is especially true for companies that can not afford to operate their facilities without the benefit of the state-approved SIP revision. Under those circumstances—when a company must decide between shutting down now or being forced out of business later—even a reduction of penalties in an ensuing enforcement action (assuming the trial court chooses to exercise such discretionary authority) fails to adequately protect it from EPA delay.

Penalty reductions are equally ineffective in discouraging EPA from usurping the primary role of the states to decide how best to achieve the goals of the Clean Air Act. The only way to safeguard the rightful role of the states—while adequately protecting corporate interests—is to prohibit EPA from bringing an enforcement action under the old SIP until it acts on the SIP revision.

ARGUMENT

I. EPA ENFORCEMENT AGAINST COMPANIES IN COMPLIANCE WITH STATE-APPROVED SIP REVISIONS DISTORTS THE STATUTORY SCHEME OF THE CLEAN AIR ACT.

Both the First Circuit in the *General Motors* case and the Sixth Circuit in *Alcan* premise their rejection of the *American Cyanamid* rule on the harm the public would suffer by prohibiting EPA from enforcing the original SIP until it denies the SIP revision.[22] This concern about public harm ignores the rightful role of the states to assure attainment of air quality goals. It also wrongly

[22] *See General Motors*, App. at 14a; *Alcan*, slip op. at 14.

disregards the fact that SIP revisions are promulgated by the states, and not by the companies that comply with them. Allowing EPA to file enforcement actions against these companies before acting on the SIP revision perpetuates a state of regulatory limbo that violates the spirit and intent of the Clean Air Act.

A. The Clean Air Act Vests The States With The Right To Make Source Emission Selections.

Section 107(a) of the Clean Air Act expressly provides that "[e]ach state shall have the *primary* responsibility for assuring air quality within the entire geographic area comprising such state." 42 U.S.C. § 7407(a) (emphasis added). This Court acknowledged the state's primary role in *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, where it also described EPA's conversely limited role in reviewing state choices for assuring air quality.

> The Agency is plainly charged by the Act with the responsibility for setting national ambient air standards. Just as plainly, however, it is relegated by the Act to a *secondary role* in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met . . . The Act gives the Agency no authority to question the wisdom of a State's choice of emission limitations if they are part of a plan which satisfies the standards of Section 110(a)(2) . . . So long as the ultimate effect of a State's choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission standards it deems best suited to its particular situation.

421 U.S. at 79 (1975) (emphasis added).

Section 110(a)(3)(A) of the Act, on the other hand, limits EPA to an essentially supervisory role—not unlike the role corporate management plays when determining

compliance with company policy. Specifically, it states that "[t]he Administrator shall approve a revision . . . if he determines that it meets the requirements of paragraph 2 and has been adopted by the State after reasonable notice and public hearings." 42 U.S.C. § 7410(a)(3)(A). Section 110(a)(2) contains a checklist of eleven criteria all SIPs must meet. 42 U.S.C. § 7410(a)(2).

In the *Alcan* case, only two of those criteria arguably related to EPA's review of the SIP II revision.[23] Nevertheless, it took EPA more than three years to disapprove the revision. Moreover, none of legal bases for disapproving the SIP II revision existed at the time of submission. Nor were these bases even promulgated until well after the end of EPA's four-month review period.[24]

Alcan's experience evidences calculated conduct on the part of EPA to intentionally deprive the states of their statutory prerogatives to make their own source emission choices. Because the SIP II revision fully complied with current regulatory requirements, EPA was legally obligated to approve it on July 3, 1986—four months after submission, just as it had been legally obligated to approve the SIP I revision in 1982. Under both the SIP I and SIP II revisions, the state had decided how it wished to implement its regulatory obligations under the Act. Moreover, these choices were fully consistent with

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[23] EPA had to determine whether the SIP II revision contained (1) emission limitations, schedules and timetable for compliance and (2) appropriate devices for monitoring, compiling and analyzing ambient air quality data. *See* 42 U.S.C. § 7410(a)(2)(B) and (C).

[24] EPA did not promulgate two of the grounds for denial (the 24-hour averaging requirement and the requirement for using surplus reductions as credits) until December 4, 1986—nine months after the SIP II revision was submitted and five months after the statutory review period had expired. 51 Fed. Reg. 43814; 43831. EPA did not issue the third requirement (for 20% reduction in overall emissions) until May 26, 1988. This was more than two years after submission.

applicable law at the time. Yet EPA—apparently deciding that it did not like the state's choices or the current law (or both)—simply refused to act. EPA's conduct makes a mockery of the Clean Air Act's statutory scheme and should not be condoned.

B. EPA Usurps The Rightful Role Of The States Every Time It Delays Review Beyond The Four-Month Period.

Every court of appeals to have ruled on the issue has held that the Clean Air Act imposes a four-month deadline on EPA to review SIP revisions. *See Council of Commuter Organizations* v. *Gorsuch*, 683 F.2d. 648, 651-52 n.2 (2d Cir. 1982); *Council of Commuter Organizations* v. *Thomas*, 799 F.2d 879, 888 (2d Cir. 1986); *Dusquense Light Co.* v. *EPA*, 698 F.2d 456 (D.C. Cir. 1983); *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (5th Cir. 1987); *United States* v. *General Motors Corp.*, 876 F.2d 1060 (1st Cir. 1989); *United States* v. *Alcan Foil Products, Division of Alcan Aluminum Corporation*, No. 88-6300, (6th Cir. Nov. 21, 1989)."[25] Each of these courts has acknowledged, as did the government in the

[25] In *Alcan*, the Sixth Circuit revisited the language in *United States* v. *National Steel Corp.*, 767 F.2d 1176, 1182-83 n. 1 (6th Cir. 1985), which the government cites as contrary authority. In that case, the Sixth Circuit had stated:

> National claims that section 110(a)(2) of the Clean Air Act . . . requires the EPA to approve or disapprove SIP revisions with four months of their submittal by the state. Section 110(a)(2) requires action within four months for general state plans submitted under section 110(a)(1), not for revisions to state plans governed by section 110(a)(3)(A)."

Upon reexamination, the Sixth Circuit found the four-month rule to be incorporated "at least by implication" in § 110(a)(3)(A) of the Act. Slip op. at 7. In support of that reading of the statute, the Sixth Circuit also cited § 110(g)(1), which was added to the Act in 1977 but not cited in *National Steel*. Slip op. at 8.

Alcan case,[26] that EPA does not have an unlimited time to act. As stated by the Sixth Circuit in *Alcan*, "[g]iven the primary role of the states in implementing air quality standards, it is difficult to conclude that EPA is not required to act with dispatch on a revision proposed by a state." Slip op. at 9. The First Circuit in *General Motors* even more explicitly expressed its concern about EPA's unbridled ability to interfere with the rightful role of the states.

> Congress clearly was concerned with preserving the state's ability to tailor SIPs to local needs and conditions and, just as plainly, did not care what controls states chose, so long as they were designed to reduce emissions to nationally acceptable levels. The states' freedom to make such choices obviously is curtailed to the extent that SIPs must be consistent with federal standards. It seems unlikely, however, that Congress also intended for the states' legitimate policy choices to be held hostage to the EPA's schedule.

General Motors, App. 12a.

Under the Clean Air Act, the states are free to alter or fine tune their air quality program as often as necessary to accommodate changing economic, technological or air quality conditions. Only by upholding the four-month deadline for reviewing SIP revisions can this Court remove the threat of protracted delay, and thus prevent EPA from depriving the states of their legitimate statutory role.

II. THIS COURT SHOULD PROTECT COMPANIES FROM THE REGULATORY LIMBO EPA'S DELAY CREATES BY PROHIBITING ENFORCEMENT UNTIL EPA ACTS ON THE SIP REVISION.

The protracted EPA delays experienced by General Motors and Alcan are not aberrations. According to a

[26] *See* Government's brief at 22, "Finally, the absence of a four-month deadline does not allow the EPA to postpone a decision indefinitely."

recent Inspector General report, it takes EPA an average of 30 months to review a proposed SIP revision—more than two years longer than the review period required by statute.[27]

As a result of EPA delay, companies that comply with the new rule changes approved by their state face the threat of federal enforcement actions for noncompliance with the original SIP. With statutory civil penalties of $25,000 per day of violation,[28] the longer EPA waits to review a SIP revision, the greater the amount of penalties recoverable—and, consequently, the greater the incentive for EPA to deny the revision and enforce the original SIP. Forcing companies to linger in this kind of regulatory limbo not only undermines the Act, but also is fundamentally unfair to those who have relied on state assurances that their emissions are acceptable and in compliance with state-authorized revisions.

A. The Remedies Proposed By The First Circuit Are An Ineffective Panacea For EPA Delay.

As a remedy for EPA failure to meet the four-month deadline, the First Circuit has suggested that companies either file a mandamus action under § 304(a)(2) of the Act[29] to compel EPA review or move the trial court in an enforcement action to reduce penalties for prejudicial delay. *General Motors* at App. 14a-16a. Alcan's experience, however, proves both options to be an ineffective panacea for EPA's failure to act.

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[27] Report of Audit, *Review of EPA's Process for Approving/Disapproving State Implementation Plans and Revisions*, Office of the Inspector General, U.S. Environmental Protection Agency (March 1989).

[28] 42 U.S.C. § 7413(c)(1).

[29] 42 U.S.C. § 7604(a)(2).

1. *Mandamus Does Not Work.*

The Sixth Circuit expressly rejected the mandamus option as "not very effective" in the *Alcan* case. Slip op. at 14. There, the local pollution control district filed suit under § 304(a)(2) to compel agency action four years after the SIP I revision was submitted for EPA review. *See Air Pollution Control District of Jefferson County, Kentucky* v. *EPA*, No. C-86-0519-L-B (W.D. Ky. 1986). This case has been pending for four years, with no action in sight.[30] It is highly unlikely that a different result would have obtained if the mandamus action been filed by Alcan instead of Jefferson County.

In addition to its proven ineffectiveness, a mandamus suit to compel EPA action is also highly impractical. Ironically, the time it takes to compel agency action (and to defend against such a suit) may cause even further delays. At the risk of incurring civil penalties of up to $25,000 per day of violation, companies can ill afford to let the meter run by invoking such time-consuming proceedings. This is especially true for marginally profitable, independent economic units like Alcan's Foil Products Division.

Even if the mandamus suit is successful and the SIP revision is approved, the company still will have wasted time and unnecessary litigation expenses in compelling action which the statute already requires to be performed within four months. If the mandamus action results in EPA's denial of the SIP revision, on the other hand, it

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[30] The Sixth Circuit apparently was referring to the SIP II revision when it erroneously stated that "a final ruling on the proposed revision came well over two years the section 304(a) suit was filed." Slip op. at 12. Regrettably for Alcan, EPA has yet to act on the SIP I revision, nearly a decade later. The agency did act on the SIP II revision, albeit more than three years late. What compelled EPA action there, however, was not a mandamus suit filed by the local authority, but rather the dismissal of its enforcement action against Alcan for noncompliance with SIP I.

would have served only to increase the penalty EPA could assess against the company in an ensuing enforcement action.

2. *Penalty Reductions Do Not Adequately Protect Companies From EPA Delay.*

The second remedy proposed by the First Circuit—penalty reductions in enforcement actions filed under § 113(b) [31] of the Act—also fails to adequately protect companies that have operated in reliance on state-authorized SIP revisions. Allowing EPA to enforce original SIPs prior to acting on SIP revisions turns Clean Air Act regulation into a game of chance. It forces companies, like Alcan, that cannot afford to operate without the benefit of the SIP revision to choose between voluntarily shutting down now—even though the state has authorized continued operation—or being shut down by EPA by heavy fines later.[32] Contrary to the First Circuit's suggestion, the possibility that penalties may be reduced in an ensuing enforcement action does little to remove the "Scylla and Charybdis choice" [33] companies face whenever EPA takes longer than four months to review a SIP revision. Penalty reductions do even less to compensate the states whose responsibilities for balancing national priorities with local interests have been totally usurped by the enforcement action. Companies that have complied with SIP revisions—and the states that have promulgated them

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[31] Section 113(b) of the Act requires that district courts "shall take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." 42 U.S.C. § 7413(b).

[32] As noted by the district court below, even if heavy fines do not force companies into bankruptcy, "that would be cold comfort to . . . workers who might be laid off while a new plant was being built or because the plant was moved out of state." *General Motors*, SA-7.

[33] *General Motors* at SA-6.

—still remain in the regulatory limbo created by EPA's delay.

Aside from the inequities of allowing EPA to enforce prior to acting on SIP revisions, there is also a practical reason why reducing penalties fails to adequately safeguard companies from EPA delay. Penalty reductions for prejudicial delay are not included among the specifically enumerated considerations mandated by the statute. As such, they are entirely at the discretion of the trial court and, therefore, provide no guarantee of protection from protracted EPA delay.

Even the First Circuit characterizes the reasonableness of EPA's delay and the prejudice suffered by the company as "among these 'other factors' the court *may* consider." *General Motors*, App. at 15a (emphasis added). The discretionary nature of this remedy is emphasized in the court's description of how it would work.

> If, for example a trial court finds that the review process should have taken ten months rather than two years, it *may decline* to award penalties for the fourteen months of unwarranted delay. Accordingly, if on remand in this case, the district court finds that GM was prejudiced by the Agency's lengthy review and the delay was not justified or that some portion of the delay was not justified, it *may reduce* the penalties in a manner it sees fit.

Id. (emphasis added).[34] Assuming the trial court ever exercises its discretionary authority to award them, reduced penalties are of slight consolation to marginally economic companies which cannot afford to pay them. For example, in the Alcan case, it is unlikely that the company could absorb even the twelve-month reduction

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[34] *Accord Alcan*, slip op. at 14 ("The district court clearly has *discretion* to determine what penalties should be imposed for noncompliance.") (emphasis added).

in fines the Sixth Circuit suggested the trial court consider on remand.[35]

B. Barring Enforcement Until EPA Acts On The SIP Revision Is The Only Equitable Remedy For EPA Delay.

The only effective, practical and fair remedy for EPA's failure to comply with the four-month rule is to invoke the *American Cyanamid* rule and prohibit EPA from enforcing the original SIP until it acts on the SIP revision. Of all the other circuit court suggestions, the *Cyanamid* rule provides the most equitable remedy for all parties affected by a SIP revision.

By requiring EPA to reject a SIP revision before it enforces the original SIP, the *Cyanamid* rule provides EPA with an incentive to abide by the four-month rule. The Fifth and First Circuits both found the lack of such an incentive critical to their rejection of the deferred penalty approach of the D.C. Circuit in *Dusquense Light Co.* v. *EPA*, 698 F.2d 456 (D.C. Cir. 1983). Both courts feared that the *Dusquense* approach of holding penalties in abeyance would encourage EPA to reject revisions it should have approved since the longer EPA delayed review, the greater the penalties it could collect in an enforcement proceeding. According to the Fifth Circuit, "EPA loses nothing by its contumaciousness" under the *Dusquense* approach. *American Cyanamid*, 810 F.2d at 499.

Nor will the threat of reduced penalties, as suggested by the First and Sixth Circuits, sufficiently modify EPA's

[35] Instead of assessing penalties from January 19, 1985, the date Alcan bought the laminating facility, the Sixth Circuit suggested that they be calculated from December 4, 1986, the effective date of EPA's new emissions trading policy upon which the SIP II revision was ultimately denied. The Sixth Circuit based this suggestion on the assumption that EPA would not be able to satisfy its burden of proving reasonable delay. *Alcan*, slip op. at 15.

contumacious behavior in refusing to honor the four-month rule. As noted by the Fifth Circuit in *American Cyanamid*, "EPA's statutory noncompliance affects not only its right to adjudicate tentatively the amount of [penalties] but also, and more important to this case, its authority to commence [enforcement] proceedings." 810 at 493. So long as EPA retains the power to enforce original SIP's prior to acting on SIP revisions, it will continue to exercise "pocket vetoes" of state air quality decisions.

EPA's deliberate distortion of the statutory scheme was of particular concern to the *Cyanamid* court and a "critical element" [36] in its adoption of the enforcement bar:

> Where, as here, the state has proposed a revision to its SIP which clearly authorizes local businesses to act in accordance with it without running afoul of the Clean Air Act, the interest of the state itself is deeply involved in the required four month approval or disapproval of the proposed revision. It distorts the statutory scheme to place virtually full emphasis on the business entity involved as the charged 'polluter.' The emphasis of the statute, rather, is upon the important role which the state plays in defining authorized emissions . . . The issue then is not so much pollution by American Cyanamid but the default of the EPA in carrying out the congressional intent to work in close cooperation with the states in implementing standards and enforcing the Clean Air Act.

American Cyanamid, 810 F.2d at 500.

Of all the remedies for EPA delay suggested by the courts of appeals, the *American Cyanamid* rule alone recognizes the inequities of allowing EPA to bring enforcement actions against companies that are in compliance with state-authorized SIP revisions. Until EPA rejects

[36] *American Cyanamid*, 810 F.2d at 499.

the SIP revision, a company should be allowed to rely on the state's determination of compliance with the Act, without the threat of federal enforcement. Only then will companies be adequately protected from EPA's recurring efforts to deprive the states of their rightful role under the Clean Air Act.

CONCLUSION

For the reasons stated above, the Chamber respectfully urges this Court to uphold the four-month rule and prohibit EPA from enforcing the original SIP until it denies the SIP revision.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

The Clean Air Act, as amended, expressly establishes a partnership in which the state and federal governments each have distinct, but complementary, roles. Under the Act, the States determine the source-specific limitations necessary to achieve national goals set by EPA. The state plans and any revisions to them must be approved by EPA. The questions presented are:

1. Whether EPA's failure to act finally upon a state-approved revision to the State's plan within four months of its submission to EPA violates the express language of the Act and Congress's intent that the State have the primary role in implementing and enforcing air pollution measures.

2. Whether EPA's failure to act finally upon a state-approved revision within the four-month deadline when a source is in compliance with the revision limits EPA's authority to enforce the unrevised state plan against that source unless EPA demonstrates that it has authority under the Act to disapprove the proposed revision.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	3
A. Statutory Background	3
B. The Massachusetts SIP Revision	5
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. CONGRESS CHOSE A SCHEME OF COOPERATIVE FEDERALISM TO IMPLEMENT THE CLEAN AIR ACT	7
II. EPA MUST TAKE FINAL ACTION ON A SIP REVISION WITHIN FOUR MONTHS OF ITS SUBMITTAL	10
III. EPA HAS BREACHED THE LIMITS CONGRESS PLACED ON ITS AUTHORITY, THEREBY USURPING THE STATE'S ROLE AND FAILING TO ACT IN ACCORDANCE WITH LAW	14
A. EPA Has Breached The Limits Congress Imposed	14
B. EPA Is Usurping The State's Role	15
C. EPA Has Acted Arbitrarily, Capriciously, And Not In Accordance With Law	16
IV. THIS COURT SHOULD INTERPET THE ACT AS CONTEMPLATING A REMEDY THAT REQUIRES EPA TO ACT WITHIN STATUTORY LIMITS	18
CONCLUSION	25

TABLE OF AUTHORITIES

CASES: Page

American Cyanamid Co. v. EPA, 810 F.2d 493 (5th Cir. 1987) 10, 14
Bethlehem Steel Corp. v. EPA, 782 F.2d 645 (7th Cir. 1986) 14
Bowen v. American Hospital Ass'n, 476 U.S. 610 (1986) 17
Brock v. Pierce County, 476 U.S. 253 (1986) 20
Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 13
Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480 (1947) 12
Connecticut v. EPA, 696 F.2d 147 (2d Cir. 1982) 7
Council of Commuter Organizations v. Gorsuch, 683 F.2d 648 (2d Cir. 1982) 10
Council of Commuter Organizations v. Thomas, 799 F.2d 879 (2d Cir. 1986) 10
Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983) 4, 10, 19
Friends of the Earth v. EPA, 499 F.2d 1118 (2d Cir. 1974) 17
General Motors Corp. v. EPA, 871 F.2d 495 (5th Cir. 1989) 10
Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49 (1987) 12
Heckler v. Chaney, 470 U.S. 821 (1985) 17
Higgins v. Smith, 308 U.S. 473 (1940) 12
Indiana & Michigan Electric Co. v. United States EPA, 733 F.2d 489 (7th Cir. 1984) 14
Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989) 11
Rainwater v. United States, 356 U.S. 590 (1958) 12
SEC v. Sloan, 436 U.S. 103 (1978) 13
Sierra Club v. EPA, 719 F.2d 436 (D.C. Cir. 1983), cert. denied, 468 U.S. 1204 (1984) 22
Sierra Club v. Ruckelshaus, 602 F. Supp. 892 (N.D. Cal. 1984) 22
Train v. Natural Resources Defense Council, 421 U.S. 60 (1975) 9, 10, 17

TABLE OF AUTHORITIES—Continued

Page

United States v. Alcan Foil Products Division, 889 F.2d 1513 (6th Cir. 1989) 10, 11, 13, 14

STATUTES:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* (1988) ..... *passim*
5 U.S.C. § 706 (1988) 17
Clean Air Act, 42 U.S.C. § 7401 *et seq.* (1982 & Supp. V 1987) ..... *passim*
42 U.S.C. § 7409 (1982) 3
42 U.S.C. § 7410 (1982) ..... *passim*
42 U.S.C. § 7413 (1982) ..... *passim*
42 U.S.C. § 7420 (1982) 4, 9
42 U.S.C. § 7604 (1982) 18, 22
42 U.S.C. § 7607 (1982) 23
Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 686 ..... 11, 12, 13
Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1982 & Supp. V 1987) 8
Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* (1982 & Supp. V 1987) 8
Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* (1982 & Supp. V 1987) 8
Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.* (1982 & Supp. V 1987) 8
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.* (1982 & Supp. IV 1986) 8

RULES AND REGULATIONS:

46 Fed. Reg. 51,386 (Oct. 20, 1981) 6
51 Fed. Reg. 42,391 (Dec. 2, 1986) 6
51 Fed. Reg. 42,392 (Dec. 2, 1986) 6
53 Fed. Reg. 36,011 (Sept. 16, 1988) 6
54 Fed. Reg. 2138 (Jan. 19, 1989) 14
54 Fed. Reg. 2139 (Jan. 19, 1989) 14

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS: Page

D. Currie, Air Pollution Federal Law & Analysis (1981) 8, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-369

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

Congress established a cooperative partnership between the States and the federal government to control air pollution. Under the Clean Air Act, as amended, 42 U.S.C.

§ 7401 *et seq.* (1982 & Supp. V 1987) (the "Act"), the States or their regional administrative bodies are obligated to meet federally established national standards setting maximum concentrations for air pollutants in outside air. Congress explicitly left to the state and local governmental bodies, operating within statutory and regulatory guidelines, the choice of which sources should be controlled to what degree so that the State's air quality meets the national standards. Congress expressly contemplated that States would revise these choices to account for local circumstances; the development of better, more efficient, or less costly control technology; or the adoption of new or more stringent federal standards. 42 U.S.C. § 7410(a)(2)(H) (1982). The Act requires a State to submit its revisions to EPA, but limits EPA's course of consideration (as to both time and substantive criteria).

Amici have an obvious and compelling concern in the questions (1) whether the Act imposes an obligation upon EPA to act finally upon each state-proposed revision to an applicable state implementation plan ("SIP") within four months of the revision's submittal to EPA, and (2) whether the Act, the Administrative Procedure Act, as amended, 5 U.S.C. § 551 *et seq.* (1988), and considerations based on federalism and sound public policy impose limits on EPA's enforcement of the unrevised SIP while EPA is considering the proposed revision.

Amici have a strong interest in requiring EPA to adhere to the statutory four-month period of consideration. Delays in EPA's approval create uncertainties regarding the States' primary role in establishing the emission limitations applicable to specific sources; undercut the enforcement of state-determined policies; reduce the likelihood that sources will make interim efforts to comply with state policies; and create incentives for sources to refuse to adopt newer, cleaner technologies in place of other control measures.

Similarly, *amici* are concerned with the remedy appropriate for EPA's delays in considering SIP revisions, including limitations on EPA's enforcement authority. It is essential that this Court interpret the Act as establishing a remedy that both provides incentives for EPA to act in a timely fashion and assures that EPA's delay does not give it greater authority or leverage over the States' choices than it possesses statutorily.

Amici submit that the decision of the court below is correct in holding that EPA must act finally on a revision to a state implementation plan within four months of the revision's submittal to EPA, but is wrong as to the constraints a breach of that four-month deadline imposes on EPA's enforcement of the unrevised plan. Because this Court's decision will have a direct effect on matters of importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

A. Statutory Background.

Under the Clean Air Act, EPA establishes National Ambient Air Quality Standards ("NAAQS"), which set limits on concentrations of certain pollutants in outside air so as to protect the public health and welfare. 42 U.S.C. § 7409 (1982). Each State then prepares a SIP that "provides for implementation, maintenance, and enforcement of [NAAQS] in each air quality control region (or portion thereof) within such State." 42 U.S.C. § 7410(a)(1) (1982). The SIP must include "emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of [NAAQS] including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution." 42 U.S.C. § 7410(a)(2)(B) (1982).

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[1] The parties' letters of consent, pursuant to Rule 37 of the Rules of the Court, have been filed with the Clerk.

Each State must submit its SIP to EPA for approval, which the statute requires EPA to grant within four months unless EPA determines that the SIP will not insure attainment of the national standards. 42 U.S.C. § 7410(a)(2) (1982). EPA may substitute its own implementation plan for a State's only when the state-submitted SIP is deemed unacceptable. 42 U.S.C. § 7410(c)(1) (1982).

The Act expressly contemplates that SIPs will be revised. Indeed, to be approved initially a SIP must contain provisions for its revision as new technologies become available, as standards change, or as required to assure continued maintenance of compliance status. 42 U.S.C. § 7410(a)(2)(H) (1982). Such revisions are subject to EPA approval in the same manner as initial submittals. 42 U.S.C. § 7410(a)(3) (1982).

The States are required to include enforcement programs in their SIPs. 42 U.S.C. § 7410(a)(2)(D) (1982). Congress also gave EPA authority to enforce SIP provisions under Sections 113 and 120 of the Act (42 U.S.C. §§ 7413 and 7420 (1982)), although primary enforcement is in the hands of the State. Before initiating an enforcement action, EPA must give notice to the State to permit the State to exercise its enforcement options. 42 U.S.C. § 7413(a)(1) (1982). When civil monetary penalties are to be assessed, "the courts shall take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." 42 U.S.C. § 7413(b) (1982).[2]

[2] Section 120 of the Act also allows EPA administratively to assess noncompliance penalties on sources failing to comply with state emission limitations. 42 U.S.C. § 7420 (1982). Such penalties are to prevent noncomplying sources from gaining an economic advantage over complying sources. *Duquesne Light Co. v. EPA*, 698 F.2d 456, 463 (D.C. Cir. 1983).

B. The Massachusetts SIP Revision.

As part of its obligations under the Clean Air Act, as amended in 1977, Massachusetts revised its SIP in 1979. These revisions required a car assembly plant owned and operated by General Motors ("GM") to achieve specified levels of emissions by December 1985. In late 1984 GM submitted a proposed schedule for installation of technology to comply with that obligation. Six months later, following discussions with state officials, GM proposed instead to construct a new facility and make significant capital investment in a new technology that would reduce emissions at the plant below those required by the 1979 revised SIP. Construction time for the new facility required an extension of the compliance deadline to December 1987. (EPA had already approved Massachusetts' request that it be given until December 31, 1987, to achieve compliance with the NAAQS.) The State, after consideration of a full administrative record, including a public hearing in which EPA participated, agreed with the new proposal (except that the deadline was extended only to August 1987), revised its SIP accordingly, and submitted that SIP revision to EPA in December 1985 for approval.

EPA, however, did not act finally on Massachusetts' revision within four months. Instead, some eight months after the submittal, EPA gave notice that GM was violating the unrevised SIP.[3] One year later, in August 1987, EPA filed suit against GM alleging that the violation was continuing. EPA's original complaint neither referenced the pending revision applicable to the facility nor the fact that the facility in question had been permanently closed and the new, lower-emitting facility was in operation. EPA did not act finally on the proposed revision for an additional year. Final disapproval was promulgated in September 1988 while this case was being

[3] Such notice is statutorily required before EPA can bring an enforcement action. 42 U.S.C. § 7413(a)(1) (1982).

briefed at the court of appeals. 53 Fed. Reg. 36,011 (Sept. 16, 1988).

EPA had expressly urged that facilities like GM's adopt the new technology and had announced a policy of favorable consideration regarding revisions. 46 Fed. Reg. 51,386 (Oct. 20, 1981). With regard to the GM facility, however, EPA apparently preferred an enforcement action rather than a revision. 51 Fed. Reg. 42,391, 42,392 (Dec. 2, 1986).

SUMMARY OF ARGUMENT

The Clean Air Act is to be implemented by cooperative federalism—Congress assigned distinct, but complementary, roles to federal and state governments. Under the statutory scheme, EPA determines the national goals, but the States decide how those standards will be achieved. State implementation plans are subject to only a limited review by EPA, and their enforcement is primarily a state function. The Act requires that EPA approve a SIP unless the SIP fails to meet one or more of eleven criteria specified by Congress, and that it do so within four months. The Act explicitly imposes on EPA review of SIP revisions the same substantive limitations, and implicitly imposes the same four-month time limit on EPA review, as every court of appeals that has addressed the issue has held. Prompt EPA action on SIP revisions is essential if the States are to perform their intended role of primary implementation and enforcement of air quality control measures.

By ignoring the statutory four-month time limit, EPA usurps the States' role through a "pocket veto" and avoids the discipline of the judicial review which the Act expressly provides for approval or disapproval of the State's plan. The uncertainty thus created is likely to delay source compliance with a SIP revision. When EPA, without passing finally upon the validity of a SIP revision, seeks to enforce the unrevised SIP, it substitutes its own judgment for that of the State concerning

the appropriate technology and emission limitations—matters that Congress expressly left for state determination. In addition, EPA assumes the enforcement role Congress prescribed for the State.

EPA's action—or inaction—also violates the Administrative Procedure Act, by effectively disapproving a SIP revision without establishing that it has a statutory basis for that decision and without any explanation.

This Court should clarify the remedies available when EPA has withheld final approval or disapproval of a state-submitted SIP revision for more than four months. We submit that EPA enforcement of a SIP under these circumstances is not barred, but should be conditioned on a showing that the revision does not meet one or more of the statutory criteria—the same showing required for formal EPA disapproval of the revision. When EPA carries that burden injunctive relief and future penalties may be appropriate, but the Court should preclude the imposition of monetary penalties upon a source that has been complying in good faith with a state-submitted SIP revision. Our proposal serves to focus all parties' resources on improvement of the nation's air quality, by encouraging source compliance with state plans, including state revisions. The proposed remedy also protects the States' implementation and enforcement role under the Act, and provides an incentive for EPA to act promptly to approve or disapprove SIP revisions.

ARGUMENT

I. CONGRESS CHOSE A SCHEME OF COOPERATIVE FEDERALISM TO IMPLEMENT THE CLEAN AIR ACT.

Congress intended that the Clean Air Act would be implemented through cooperative federalism—a partnership in which the state and federal governments each have distinct, but complementary, roles. See, *e.g.*, *Connecticut v. EPA*, 696 F.2d 147, 151 (2d Cir. 1982)

(describing the Act as a "bold experiment in cooperative federalism"). Congress recognized that States are more closely attuned than the federal government to local conditions and concerns and that policies with important local effects should be determined by local agencies.[4] Thus, Congress has regularly turned to state-federal partnerships to achieve environmental regulatory goals and has given the States major responsibility for carrying out substantive aspects of the regulatory schemes.[5]

The congressionally established scheme under the Clean Air Act requires EPA to determine the national goals

[4] The whole history of halting federal advances into fields such as these reflects a firmly rooted tradition that federal intervention should be a last resort and should be limited to the minimum consistent with effectuating the statutory ends.

> It is tempting to dismiss this tradition impatiently as a vestige of an antiquated view of state sovereignty. Since the states cannot handle pollution, perhaps the federal government should do the job simply and efficiently itself. Professor Luneburg sounds a warning note: "[I]t would be unlikely that one federal agency could easily design plans individually suited to the needs and conditions of the different areas of the nation," and "the probable local resistance to federally designed measures" should not be underestimated. Not least, the specter of a huge army of all powerful federal bureaucrats is enough to give pause; the analogy of federalizing the police suggests there may still be safety against arbitrary governmental action in the dispersal of power.

D. Currie, Air Pollution Federal Law & Analysis § 4.34 (1981) (footnotes omitted).

[5] Such statutes include the 1972 and 1977 amendments to the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1982 & Supp. V 1987); the Safe Drinking Water Act, as amended, 42 U.S.C. § 300f *et seq.* (1982 & Supp. V 1987); the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("Superfund"), 42 U.S.C. § 9601 *et seq.* (1982 & Supp. V 1987); the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.* (1982 & Supp. IV 1986); and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* (1982 & Supp. V 1987).

and insure that States meet these goals. But while EPA sets NAAQS, each State, not EPA, determines how the standards set by EPA will be achieved. EPA "is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975) (footnote omitted).

In enforcement, as well, Congress intended that States have primary responsibility and gave EPA a limited role. EPA may assume full responsibility for enforcement of a SIP only if EPA finds that a State has failed to enforce its implementation plan and only after it provides a thirty-day notice to the State. 42 U.S.C. § 7413(a)(2) (1982). EPA may initiate individual enforcement actions only after first giving the State thirty days' advance notice. 42 U.S.C. § 7413(a)(1) (1982).[6]

Congress gave the States great flexibility in meeting their responsibility of assuring air quality within their borders. "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train*, 421 U.S. at 79. The State's discretion "includes the continuing authority to revise choices about the mix of emission limitations." *Id.* at 87.

To achieve its intent that the States have primary authority for air quality within their boundaries, Congress placed both substantive and time limits on EPA's review of state implementation plans. EPA can disapprove a SIP or SIP revision only if it fails to meet one or more of the eleven criteria prescribed by Congress in

[6] EPA may also delegate to a State the authority to assess and collect noncompliance penalties when appropriate. 42 U.S.C. § 7420(a)(1)(B) (1982).

Section 110(a)(2)(A)-(K), 42 U.S.C. § 7410(a)(2)(A)-(K) (1982).

If a SIP or a SIP revision meets these criteria, EPA has no discretion and must approve the state submission even if EPA would pick a different mix of emission limitations:

> Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2) . . . .

Train, 421 U.S. at 79 (emphasis in original).

II. EPA MUST TAKE FINAL ACTION ON A SIP REVISION WITHIN FOUR MONTHS OF ITS SUBMITTAL.

To assure clear statements of pollution control requirements and to hasten compliance with the state-determined source-specific limitations, Congress imposed time constraints on EPA's review of SIPs—requiring final action within four months after a State makes its submission. 42 U.S.C. § 7410(a)(2) (1982). The four-month deadline also applies to EPA's review of state-submitted revisions to SIPs, as the court below and every other court of appeals that has addressed the issue has held.[7]

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[7] Pet. App. 11a-12a; *United States v. Alcan Foil Products Division*, 889 F.2d 1513, 1518 (6th Cir. 1989); *American Cyanamid Co. v. EPA*, 810 F.2d 493, 495 (5th Cir. 1987); *Duquesne Light Co. v. EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983); *Council of Commuter Organizations v. Gorsuch*, 683 F.2d 648, 651-52 n.2 (2d Cir. 1982). See also *General Motors Corp. v. EPA*, 871 F.2d 495, 498 (5th Cir. 1989); *Council of Commuter Organizations v. Thomas*, 799 F.2d 879, 888 (2d Cir. 1986).

EPA's contrary argument, that Section 110(a)(3)(A)[8] incorporates by reference only the substantive criteria of Section 110(a)(2), has never been accepted as the correct reading of congressional intent. The Sixth Circuit correctly noted that "it seems clear to us that Congress intended to incorporate the time limit, and felt it had done so by referring to 'the requirements of paragraph (2).'" *United States v. Alcan Foil Products Division*, 889 F.2d 1513, 1518 (6th Cir. 1989).

The statute expressly references the Administrator's obligation to approve or disapprove revisions "within the required four month period." 42 U.S.C. § 7410(g)(1). EPA argued below that Section 110(g)(1) was irrelevant to the true meaning of Sections 110(a)(3)(A) and 110(a)(2) because subsection (g) was enacted in the 1977 Amendments to the Clean Air Act, while subsections (a)(2) and (a)(3)(A) were enacted in 1970. EPA's argument is both legally incorrect and factually specious. This Court has long held that a statute must be read as a whole, regardless of the enactment dates of individual sections. *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2278 n.2 (1989) ("We . . . read CERCLA and SARA [amendments to CERCLA] together, and argue that SARA's wording must inform our understanding of the other definitional sections of the statute.")[9]; see also

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[8] Section 110(a)(3)(A) provides that: "The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings." 42 U.S.C. § 7410(a)(3)(A) (1982).

[9] Justice White's concurring opinion in *Union Gas* does not require a different result in this case. Justice White's point of departure (see 109 S. Ct. at 2290 n.1) was in a case requiring stringent review to establish an "unmistakable statement" of congressional intent to abrogate the States' sovereign immunity. The issue in this case does not involve the States' liability, and thus the statutory interpretation need not meet that higher standard of review.

Clark v. Uebersee Finanz-Korporation, A.G., 332 U.S. 480, 488 (1947) ("Our task is to give all of it [the Trading With the Enemy Act and later amendments thereto]—1917 to 1941—the most harmonious, comprehensive meaning possible.").[10]

Indeed, subsection 110(g) is particularly relevant because, in passing the 1977 Amendments, Congress understood that the changes would require further SIP revisions, which were specifically referenced in the criteria in Section 110(a)(2).[11] Thus, in citing the "required four month period" in subsection 110(g), Congress was stating the time limit it imposed on EPA's review of those SIP revisions compelled by specific requirements

[10] While after-the-fact "legislative history" is not probative as to the intent of an earlier Congress, amendments of a statute by a later Congress are certainly probative of any other section in the statute. The cases cited by EPA in its briefs below do not refuse to interpret an act and its amendments together when the act as amended is the applicable law. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 63 n.4 (1987) (refusing to rely on conflicting legislative history of amendments passed after the court of appeals had issued its opinion); *Rainwater v. United States*, 356 U.S. 590, 593 (1958) (refusing to rely on 1918 amendment to criminal penalties to interpret separately codified 1863 civil penalties); *Higgins v. Smith*, 308 U.S. 473, 479-80 (1940) (refusing to use Revenue Act of 1934 to interpret tax liability under Revenue Act of 1932).

[11] See, *e.g.*, 1977 amendments to Section 110(a)(2) mandating that SIPs meet numerous requirements added by other sections of the 1977 Amendments: 110(a)(2)(D) (adding references to permits required by Parts C and D, which were added by the 1977 Amendments); 110(a)(2)(E) (adding reference to Section 126, also added in 1977, regarding interstate pollution abatement requirements; 110(a)(2)(F) (adding reference to Section 128, also added in 1977, regarding composition of state boards); 110(a)(2)(H) (requiring SIPs to provide for revision when EPA finds a plan fails "to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977"); 110(a)(2)(I) (adding reference to requirements added in 1977 regarding nonattainment areas); 110(a)(2)(J) and (K) (new subparagraphs requiring that SIPs meet various provisions added by the 1977 Amendments). Pub. L. No. 95-95, § 108, 91 Stat. 686, 693-94 (1977).

added in 1977 and all other revisions. Far from being a *post hoc* assertion by a later Congress of an earlier Congress's intent, subsection 110(g) represents the then-current expression of a Congress contemplating plan revisions and defining the appropriate procedural and substantive requirements.[12]

Congress's intention that the Clean Air Act be implemented through cooperative federalism—a partnership between the federal and state governments—reinforces this interpretation. Only if EPA promptly reviews the state-submitted SIP revisions can the State perform its congressionally intended role as the primary implementer and enforcer of its air quality control measures. Although such expeditious action may be difficult, EPA cannot be allowed to circumvent Congress's policies by disregarding the deadline.[13]

[12] EPA's contrary interpretation of the statute is not entitled to deference. A reviewing court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). Even if the Act were considered ambiguous or silent on a particular issue, a reviewing court should not defer to an agency's interpretation that "frustrate[s] the congressional policy underlying a statute." *SEC v. Sloan*, 436 U.S. 103, 118 (1978). Here, EPA's interpretation frustrates the statutory purpose because it allows EPA to usurp the role that Congress intended for the States. Furthermore, as the court below warned, "we think it dangerous to defer in a situation such as this where the Agency has a substantial institutional interest in not imposing constraints on itself." Pet. App. 11a; see also *Alcan Foil Products*, 889 F.2d at 1518.

[13] There is nothing in the record to support the court of appeals' assertion that EPA would usually require more than four months to act finally on a SIP revision.

III. EPA HAS BREACHED THE LIMITS CONGRESS PLACED ON ITS AUTHORITY, THEREBY USURPING THE STATE'S ROLE AND FAILING TO ACT IN ACCORDANCE WITH LAW.

EPA, by bringing an action to enforce an existing SIP while holding in limbo a state-approved SIP revision for more than four months, is attempting to accomplish through inaction what Congress has forbidden it from doing directly. EPA's action thereby usurps the responsibilities Congress intended for the States and is arbitrary, capricious, and not in accordance with law.

A. EPA Has Breached The Limits Congress Imposed.

There is no issue that EPA has grossly violated the four-month statutory deadline imposed by Congress for EPA consideration of SIP revisions. EPA took almost three years to take final action on the Massachusetts revision at issue here (Pet. App. 6a-8a) and even longer to review the SIP revisions at issue in another enforcement case. *American Cyanamid Co.*, 810 F.2d at 497 (no decision after four and one-half years). See also *Alcan Foil Products*, 889 F.2d at 1516-17 (final action took two and one-half years).[14]

EPA's prolonged review of SIP revisions also violates the substantive limits placed on EPA by the Act. When EPA fails to act for three, four, or more years on a state-submitted revision, EPA exercises a "pocket veto" disapproving the State's plan. See *Bethlehem Steel Corp. v. EPA*, 782 F.2d 645, 650 (7th Cir. 1986); *Indiana & Michigan Electric Co. v. United States EPA*, 733 F.2d 489, 492 (7th Cir. 1984). EPA's effective disapproval comes without any determination as to whether the revision meets the congressionally mandated criteria or any evidence that EPA has considered only the factors allowed by Congress.

[14] EPA has admitted that it often exceeds even the fourteen-month administrative schedule it has set for itself. 54 Fed. Reg. 2138, 2139 (Jan. 19, 1989).

This case exemplifies the problems created by such a "pocket veto." First, EPA's refusal to address the revision prevents it from coming into full effect,[15] without any of the protection and limitations on discretion required by Congress. Without a final action, EPA's effective disapproval is outside the statutory framework and can neither be disputed by a State or source nor controlled by the courts.

Second, as discussed more fully below, EPA's inaction, coupled with its attempt to enforce the existing SIP, effectively substitutes EPA's judgment for the State's decision regarding the appropriate technology, emission limitations, and enforcement avenues to be applied to a particular source—a decision Congress expressly left to the State.

Third, by refusing to act on the revision while seeking enforcement of its preferred position, EPA has harmed attainment and maintenance of air quality standards by undercutting any incentive for sources to accept and comply promptly with state revisions. During the period in which EPA holds the State's revision in limbo, industry does not know which emission limitation ultimately will apply. Such uncertainty over a period of several years is likely to delay compliance or at least to delay investment in expensive air pollution control equipment. Thus, despite the Act's preference for revisions as a means to upgrade technology and limitations, EPA's ongoing failure to act makes such revisions either a nullity or, as here, a gamble for both the State and the source.

B. EPA Is Usurping The State's Role.

In addition to violating its assigned role under the Act, EPA's "pocket veto" of state-submitted revisions destroys the cooperative federalism by which Congress intended

[15] Until the revision has been approved by EPA, Section 110(d) of the Act defines the "applicable implementation plan" as the unrevised SIP.

the Act to be implemented. By its delayed action, EPA rather than the State determines the applicable mix of emission limitations and prevents the State from proposing a better solution.

EPA's inaction also usurps the State's enforcement role. By establishing a revision, the State has made both a policy decision as to the proper emission limitations and an enforcement decision regarding the source. EPA's failure to act expeditiously leaves the source bound by a state regulatory requirement different from the federal requirement and in many instances unable to comply with both. It is precisely this regulatory limbo that Congress sought to avoid by requiring expeditious action.

EPA's infringement on the State's role is even more egregious when EPA couples the delayed review of a state-approved revision with an attempt to enforce the existing SIP. In that situation, EPA not only prevents the State from carrying out its duties under the Act, but EPA arrogates those duties unto itself. By attempting to enforce the existing SIP, EPA supplants the revision with its own views as to the appropriate emission limitations and enforcement choices. As this Court has recognized, Congress decided that the States would determine source-by-source emission limitations and that EPA could take over that role only upon finding that a State was not complying with the requirements of the Act. 42 U.S.C. § 7410(c)(1) (1982).

C. EPA Has Acted Arbitrarily, Capriciously, And Not In Accordance With Law.

EPA's "pocket veto" of a state-submitted SIP revision also violates the Administrative Procedure Act. Because EPA's lengthy review of a state-approved revision coupled with enforcement of the existing SIP is essentially a disapproval of the State's revision during the time the revision is under review, EPA's actions must be subject to the same limits as an outright disapproval of the revi-

sion. To hold otherwise would circumvent Congress's intent by placing form above substance. Thus, EPA's disapproval of SIPs and SIP revisions is subject to the limitation under the APA that EPA's action not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (1988); see, *e.g.*, *Friends of the Earth v. EPA*, 499 F.2d 1118, 1123 (2d Cir. 1974); D. Currie, Air Pollution Federal Law & Analysis § 9.01 (1981).

This Court has recognized that Congress has explicitly set forth both the factors EPA is required to consider and the bounds beyond which EPA cannot stray in reviewing a SIP revision. *Train*, 421 U.S. at 80. Clearly, EPA would be acting arbitrarily, capriciously, and not in accordance with law if it disapproved a SIP revision for a reason other than those listed in Section 110(a)(2)(A)-(K) of the Act. EPA also is required to explain the rationale and factual basis for its decision. See, *e.g.*, *Bowen v. American Hospital Ass'n*, 476 U.S. 610, 627 (1986) (plurality opinion).

If EPA were free to enforce an existing SIP while a SIP revision has been awaiting EPA approval for more than four months, EPA would by its inaction acquire the authority to disapprove a SIP revision for any reason (whether allowed by Congress or not) and without an explanation to anyone. Direct action of this sort by EPA would violate both the Clean Air Act and the APA. Given that Congress has limited EPA's direct action, EPA cannot be allowed to exercise unfettered discretion when it has failed to act as required by Congress.[16]

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[16] The issue here, of course, is not whether the agency generally has discretion to enforce, nor whether enforcement decisions can be reviewed. Even though an agency's decision not to prosecute or enforce is generally unreviewable as action committed to agency discretion, an enforcement action "at least can be reviewed to determine whether the agency exceeded its statutory powers." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). The issue presented here is whether the agency can effectively broaden its power or

IV. THIS COURT SHOULD INTERPET THE ACT AS CONTEMPLATING A REMEDY THAT REQUIRES EPA TO ACT WITHIN STATUTORY LIMITS.

In interpreting the Act to determine the remedy when EPA has violated the statutory scheme, this Court must give full effect to Congress's intentions (1) that progress be made toward achieving and maintaining national air quality standards; (2) that the State play the primary role in implementing the Act; and (3) that EPA's discretion be defined by congressionally prescribed limitations. Neither the parties nor the courts of appeals have suggested a remedy for EPA's breach of the four-month deadline that adequately meets these goals. An appropriate remedy must give EPA an incentive to act within the statutory deadline and must also prevent EPA from acting in excess of its statutory authority. We believe that these goals can best be met through emphasizing injunctive relief to bring a source into compliance with the appropriate SIP and by limiting monetary penalties when a source has complied in good faith with a state-approved SIP revision.

We submit that the proper remedy is not to bar EPA enforcement, but to condition it on a demonstration that EPA's discretion has been appropriately confined.[17]

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discretion beyond that which Congress granted and then assert that its usurpation of power is unreviewable.

[17] A complete bar to enforcement proceedings is contrary to Congress's carefully crafted scheme. Section 110(d) of the Act provides that the existing SIP is the "applicable implementation plan" for enforcement purposes, and Congress granted explicit (although conditioned) authority to EPA to enforce the "applicable implementation plan." Both EPA and the States have authority to enforce the Act through injunctive and penalty provisions, and citizen suits to prevent or stop violations are also expressly permitted, 42 U.S.C. § 7604(a). It would be anomalous to create a situation in which States could enforce, private citizens could enforce, but the expert federal agency with explicit statutory authority could not.

Where a State has submitted a relevant SIP revision, any EPA enforcement should explicitly take into account the revision and the statutory criteria limiting EPA's discretion. We propose simply that EPA's authority be limited to enforcing the appropriate SIP—the SIP as revised (if the revision meets the criteria under the Act) or the SIP as unrevised (if the revision does not meet the Act's requirements)—and that the burden of demonstrating that the revision does not meet the statutory tests be laid expressly on EPA. EPA should not be allowed to enforce the unrevised SIP unless it affirmatively and specifically alleges, and establishes before the enforcing court, a basis for disapproving the state-submitted SIP revision.[18]

Where a state-approved revision meets the Act's criteria, EPA's only legitimate statutory role is to assure enforcement of and compliance with the revised SIP on an appropriate and reasonable schedule. A revision such as in this case, which established a schedule of compliance and with which GM apparently complied, should not be

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[18] The discussion in text concerns only enforcement actions brought after the four-month review period allowed to EPA for action on state-submitted SIP revisions. Even within the four-month period, however, the pendency of a SIP revision should be considered in any enforcement proceeding. Thus, even though the unrevised SIP is the "applicable" SIP under Section 110(d) of the Act, EPA cannot act arbitrarily. Compelled compliance with the existing SIP when EPA has no discretion but to approve the submitted revision would be arbitrary and capricious because it would enforce a provision that will soon expire, *i.e.*, once EPA approves the revision or the four-month period runs.

For the same reasons, we believe that the imposition of penalties under Section 113 of the Act during the four-month review period is also subject to limits. During the four-month review period, any penalties must be subject to the proper discretion of the court, with careful review to prevent the arbitrary imposition of penalties. (EPA cannot impose penalties administratively on the source under Section 120 while the SIP revision is under review. *Duquesne Light*, 698 F.2d at 471.)

effectively gutted by EPA's inaction unless EPA can show that the revision violates the Act's criteria.[19]

We believe that the overall statutory scheme requires that EPA's enforcement discretion be confined by express consideration and explanation of the relation between EPA's proposed enforcement and the submitted revision. Where the appropriate showing is made, EPA could obtain injunctive or other relief to establish a schedule for compliance with the unrevised SIP.[20]

The Court's remedy for EPA's undue delay should also generally preclude Section 113 monetary penalties on sources complying in good faith with SIP revisions to assure that the possibility that penalties will be imposed does not inhibit source compliance with the limitations and deadlines that the State has determined to be appropriate.[21] In our view, the source's good faith compliance

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[19] We note that EPA's failure to act on a revision also violates the congressional intent that States be given the opportunity to correct the flaws in any noncomplying revision, 42 U.S.C. § 7410 (a)(3)(B) (1982). EPA's one-two combination of failing to act on the revision while enforcing the unrevised SIP withholds from the State its statutorily provided opportunity to correct the submitted revision.

[20] Such relief is no longer at issue in the case before the Court because EPA dropped its request for injunctive relief once it learned that GM's allegedly noncomplying facility had been closed permanently prior to initiation of this action. Compare Complaint, J.A. 12, ¶ (a), with Amended Complaint, J.A. 117.

[21] The limitation of monetary penalties does not run afoul of *Brock v. Pierce County*, 476 U.S. 253 (1986). EPA still would have enforcement powers, so our proposed remedy does not "divest the [government] of jurisdiction to act after that time." 476 U.S. at 266. Furthermore, unlike the limitation proposed in *Brock*, where the public arguably would have lost money to which it would have been entitled if the government had acted promptly, the proposed limit on penalties in this case does not keep from the federal government money to which it would be entitled if EPA had acted promptly. Rather, the enforcement conditions simply focus the attention of all involved parties on the proper statutory criteria and timetables.

with the relevant state-determined limitations should affect not only the amount but also the availability of penalties. The threat of penalties for the period of EPA's delay requires a source either to ignore the State's determination of limitations and compliance deadlines or to gamble on EPA's approval. Where the four-month review period has passed without EPA disapproval of the SIP revision, a source should be expected to comply with the state-approved revision and should not be penalized for doing so. If the revision meets the statutory criteria, source compliance is within the congressional intent; and EPA should not be able to seek penalties for conduct Congress sought to foster.

Should EPA demonstrate that the revision does not meet statutory criteria, the court should set an appropriate schedule for compliance with the existing SIP. Penalties under Section 113 should then be levied for violation of that schedule, but not for the period of the source's good faith compliance with the state-approved revision.[22] This interpretation balances the congressional intent to let States determine the source-specific emission limitations and enforcement measures with the availability of penalties for those who do not comply with the SIP as finally determined.

The Act establishes limitations on EPA's enforcement. See 42 U.S.C. § 7413(b) (1982). Clear guidelines are

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[22] Of course, where, at the time of enforcement, the source is in compliance with neither the revision nor the unrevised SIP, penalties are appropriate. Moreover, where EPA can show that the revision is a mere contrivance or sham with no reasonable air pollution control purpose, the imposition of penalties back to the notice date may be appropriate. But neither of these exceptions is presented by this case.

essential here, to assure that all parties, including sources subject to SIP revisions, understand and respond to the primacy Congress gave state determinations of source-specific requirements.[23]

By focusing all parties' resources on compliance with a state-approved plan or revisions that meet statutory criteria, our proposed remedy protects the public health and welfare and furthers Congress's goal of improving the nation's air quality. Injunctive relief is available to assure compliance with the provisions necessary to achieve the national air quality standards. The limitation on monetary penalties gives industry incentive to comply with State limitations and schedules but allows EPA to seek monetary penalties against egregious violators that are failing to comply with any SIP provision.

Our proposed remedy also protects the State's role and gives EPA incentive to act promptly in conformity with its statutory duty.[24] The requirement that EPA show

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[23] The additional remedy proposed by the court below of allowing courts to consider EPA's delay as a relevant factor in assessing monetary penalties does not significantly increase industry's incentive to comply quickly because it fails to decrease the uncertainty as to which SIP provisions will govern.

[24] For these reasons, our remedy is superior to a mandamus action under Section 304 of the Act, 42 U.S.C. § 7604 (1982). At most, a mandamus action addresses only half of the problem—EPA's failure to act within the statutory deadline. Even then, EPA's record for complying with court-ordered deadlines is not promising. See, *e.g., Sierra Club v. Ruckelshaus*, 602 F. Supp. 892 (N.D. Cal. 1984) (holding EPA in contempt for failing to meet a court-ordered deadline after EPA had already failed to meet the statutory deadline); see also *Sierra Club v. EPA*, 719 F.2d 436, 469-70 (D.C. Cir. 1983) (detailing EPA's failure to promulgate statutorily required regulations in six years where the statutory deadline was six months), *cert. denied*, 468 U.S. 1204 (1984). There is little reason to think that a court-imposed four-month deadline would make EPA act more quickly than a statutorily imposed four-month deadline. Requiring a State or source to bring a mandamus action is also unfair because it imposes additional costs on them merely to seek performance of EPA's required duties. Congress expected all parties to focus on compliance with the chosen state policies, rather than battling each other over how soon EPA must act in considering those policies.

Moreover, a mandamus action will only compel a decision, not determine the proper choice. It thus fails to provide an incentive for industry to comply quickly with the State's chosen emission limitations.

that it has justification to disapprove the SIP revision in order to enforce the existing SIP imposes no greater limitation than that expressly provided by the Clean Air Act and the APA.[25] The State's policy choices are protected because EPA is allowed to override them only if it can show that it has a statutory basis to do so.[26] The limitation on monetary penalties if a source is in compliance with a state-approved SIP revision further protects the State's role and gives EPA an incentive to act promptly if it believes that the revision should be disapproved.[27]

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[25] There can be no reasonable argument that requiring EPA to make a *prima facie* showing of its basis to disapprove the revision contravenes the exclusive jurisdiction of the courts of appeals to review EPA's final approval or disapproval of SIP revisions, 42 U.S.C. § 7607(b)(1) (1982). That exclusive jurisdiction applies only where a final administrative action has occurred. Where EPA has precluded such review by its delay, and then brings an enforcement action, the Act plainly contemplates review of EPA's actions in the enforcement case. See 42 U.S.C. § 7607(b)(2) (1982).

[26] A SIP revision is presumptively valid because States are presumed to act in good faith. The presumptive validity of state-submitted revisions is also borne out by the limitations Congress placed on EPA's ability to disapprove revisions. Congress, while recognizing that the States' economic interests may give a State reason to consider the source's concerns, expressly provided for state authority, and EPA should not benefit from an assumption that a State would submit an inappropriate revision.

[27] The prohibition on monetary penalties if a source is complying with the state-approved revision also addresses a serious potential issue regarding EPA's credibility. Where, as here, EPA's disapproval of the state-approved revision has no effect except perhaps

This enforcement scheme also addresses EPA's asserted fear that the States will flood EPA with disingenuous requests. EPA has made no showing that Massachusetts or other States have submitted disingenuous requests for revisions, whether by industry cooperation or otherwise. In any event, if a revision clearly disregarded the criteria established by EPA and Congress, then EPA should be able to dispose of the revision promptly; and prompt action by EPA would control any such practice by the States. Finally, if the proposed revision were not made in good faith, EPA could enforce the existing SIP because the revision would fail to meet the criteria for approval.

Thus, our proposed remedy gives full and balanced effect to the entire congressional scheme, leaving EPA with neither reduced nor enhanced authority or discretion, and permits the States to fulfill their role within our federal system and the statutory limitations.

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on EPA's collection of monetary penalties, there could be an appearance that EPA is acting improperly.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed as to the holding that EPA is required to act on revisions to state implementation plans within four months and reversed as to the appropriate remedy when EPA brings an enforcement action on the unrevised SIP after a revision has been pending for more than four months.

Respectfully submitted,

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October Term, 1989

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
ARGUMENT	4
A. Enforcement by EPA is Barred	4
B. The Massachusetts Revisions Constituted Binding State Law, Enforceable by the Commonwealth of Massachusetts against General Motors	5
C. The United States is Estopped from Enforcing the Existing SIP	8
CONCLUSION	12

TABLE OF AUTHORITIES

Page

Cases:

American Cyanamid Co. v. EPA, 810 F.2d 493 (5th Cir. 1987) 12

Arnold Irrigation District v. Department of Environmental Quality, 79 Or. App. 136, 717 P.2d 1274 (1986) 9

California Federal Savings and Loan Association v. Guerra, 479 U.S. 272 (1987) 7

Council of Commuter Organization v. Thomas, 799 F.2d 879 (2d Cir. 1986) 12

Dixson v. United States, 465 U.S. 484 (1984) 10

Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983) 12

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 7

Florida Power & Light Co. v. Costle, 650 F.2d 579 (5th Cir. 1981) 5, 8

H.J. Inc. v. Northwestern Bell Telephone Co., 109 S. Ct. 2893 (1988) 2

Heckler v. Community Health Services of Crawford, 467 U.S. 51 (1984) 11

Hines v. Davidowitz, 312 U.S. 52 (1941) 8

Lyng v. Payne, 476 U.S. 926 (1986) 11

Mianus River Preservation Committee v. Administrator, Environmental Protection Agency, 541 F.2d 899 (2d Cir. 1976) 10

Pacific Gas & Electric Company v. The Public Utilities Commission of California, 475 U.S. 1 (1986) 2

Parklane Hoisery Company, Inc. v. Shore, 439 U.S. 322 (1979) 2

Train v. Natural Resources Defense Council, 421 U.S. 60 (1975) 6, 7, 9

Tull v. United States, 107 S. Ct. 1831 (1987) 2

United States v. Alcan Foil Product, 694 F. Supp. 1280 (W.D. Ky. 1988), *aff'd in part and rev'd in part*, 889 F.2d 1513 (6th Cir. 1989) 12

United States v. Arkwright, Inc., 690 F. Supp. 1133 (D.N.H. 1988) 11, 12

W.W. Dean & Associate v. City of San Francisco, 188 Cal. App. 3d 1330, 234 Cal. Rptr., 51 (1987) 9

Constitution, Statutes and Rules:

U.S. Const., art. VI, cl. 2 3

18 U.S.C. § 201(a) (1982) 10

33 U.S.C. § 1341 (1982) 9

42 U.S.C. § 7401 *et seq.* 5

42 U.S.C. §§ 7407(a) and 7410 (1982) 9

42 U.S.C. § 7410 (1982) 3, 9, 13

42 U.S.C. § 7416 (1982) . . . . . *passim*

42 U.S.C. § 7502(a)(2) (1982) 4

40 C.F.R. § 52.1167 (1988) 3

46 Fed. Reg. 51, 386 (1981) 3

310 C.M.R. 7.18(7) 3

Publications:

78 U. Mich. L. Rev. 155, 202 (1979) 13

IN THE
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OCTOBER TERM, 1989

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center based in Washington, D.C. with 120,000 members nationwide. WLF is committed to advancing the free enterprise system and to promoting the principles of judicial restraint involving constitutional and statutory law. To this end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in cases

affecting business and commerce. *See, e.g., H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1988); *Tull v. United States*, 107 S. Ct. 1831 (1987); *Pacific Gas & Electric Company v. The Public Utilities Commission of California*, 475 U.S. 1 (1986); and *Parklane Hoisery Company, Inc. v. Shore*, 439 U.S. 322 (1979).

In accordance with Supreme Court Rule 37.1, *amicus* has not reiterated the arguments of the petitioner, but has focused on the issue of whether equitable principles preclude enforcement by the Environmental Protection Agency.

WLF submits this brief on behalf of petitioners with the written consent of both parties pursuant to Rule 37.3.

STATEMENT OF THE CASE

For the sake of brevity and avoidance of duplication of argument, the statement of the case contained in the Petition for Writ of Certiorari is incorporated herein by reference and the argument contained therein is approved.

In this case a person[1] subject to the enforcement powers of two sovereigns is threatened with the imposition of retroactive penalties by one for having complied with the law of the other. General Motors, having complied with the authority of the Commonwealth of Massachusetts, is subjected to a belated enforcement action in which the Environmental Protection Agency (EPA) seeks to have the federal district court, with the imprimatur of the Supreme Court of the United States,

[1]As defined in 42 U.S.C. § 7602(e) (1982).

impose civil penalties upon it notwithstanding that compliance.

The framers of the Constitution anticipated conflict between state and federal law and sought to provide for it in the supremacy clause. U.S. Const., art. VI, cl. 2. The supremacy clause does not, however, invalidate or render unenforceable the Massachusetts law involved in this case, because the federal Congress expressly provided that preemption would not apply except in a narrow band of circumstances, 42 U.S.C. § 7416 (1982).

Moreover, the Commonwealth of Massachusetts acted in part as an agent of the United States in conformance with, and at the invitation of, a federal statute. 42 U.S.C. § 7410 (1982). General Motors, in continuing to operate the Framingham facility past the date specifically blessed by EPA, justifiably and reasonably relied on the representations, deference and failure to perform a statutory duty of one federal agent, EPA, juxtaposed against the actual and apparent authority of another, the Commonwealth of Massachusetts. Equitable principles militate against the imposition of penalties for actions which were based on such reliance.

The following chronology emphasizes the significant order of events underlying this case.

> In 1979, Massachusetts promulgated its SIP regulation requiring full compliance by December 31, 1985. 310 C.M.R. 7.18(7); *see* 40 C.F.R. § 52.1167 (1988).
>
> In 1981, EPA published policy statement advocating deferral of compliance duties to 1986 or 1987. 46 Fed. Reg. 51, 386 (1981).

In 1985, Massachusetts revised its regulations to extend the applicable deadline for compliance to August 31, 1987.

On December 30, 1985, Massachusetts submitted the revisions to EPA.

In early 1986, negotiations between officials of EPA Region I and Massachusetts and General Motors took place.

On July 7, 1987, General Motors shut down the Framingham paint facility, about two months before the Massachusetts state law deadline of August 31, 1987, and almost six months before the Congressionally mandated attainment date for ozone of December 31, 1987. 42 U.S.C. § 7502(a)(2) (1982).

On August 17, 1987, the United States filed an enforcement action against General Motors for operation of Framingham facility after December 31, 1985.

ARGUMENT

A. Enforcement by EPA is Barred.

The *amicus curiae* agrees with the argument of the Petitioner, that enforcement by EPA is barred as a result of its failure to disapprove the SIP revisions within the four month period. Additionally, in the circumstances of this case, equity bars enforcement by EPA of the original SIP to protect General Motors from the jeopardy of conflicting enforcement by two sovereigns, and by the application of principles of equitable estoppel.

B. The Massachusetts Revisions Constituted Binding State Law, Enforceable by the Commonwealth of Massachusetts against General Motors.

In the Clean Air Act, 42 U.S.C. 7401 *et seq.*, Congress made its intention abundantly clear that the states retained their police power to regulate in this area, subject only to specified restrictions. The findings enacted by Congress include one that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments...." 42 U.S.C. § 7401(a)(3) (1982). The purposes of the Clean Air Act are stated to include the provision of "technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs;...." 42 U.S.C. § 7401(b)(3). Only in a narrowly defined range of circumstances is state regulation displaced in favor of federal regulation. 42 U.S.C. § 7416. Under that section, Congress has expressly left to the states the authority to regulate in the areas not mentioned as being exclusively within the federal domain.

In circumstances such as those underlying this case, in which an emission standard or limitation is in effect under an applicable state implementation plan (SIP), the state retains the authority to adopt and enforce emission standards and limitations provided that they are no less stringent than those under the existing plan. 42 U.S.C. 7416. The issue of what is more or less stringent is to be determined by reference to the national ambient air quality standards (NAAQS) and the Congressionally mandated attainment date. *See Florida Power & Light Co. v. Costle*, 650 F.2d 579 (5th Cir. 1981).

In this case, Massachusetts, in exercise of these retained powers, adopted an air emission standard and schedule and submitted it to EPA as a revision to its existing SIP, as being no less stringent than the standard or limitation under the existing SIP. While one component of the revision had the effect of extending the date of compliance with the old standard which was provided in the existing SIP, this fact by no means leads to an inevitable conclusion that the Massachusetts revision was less stringent than the existing standard. The standard under the submitted revision required a lowering of emission levels. The revision was technology forcing, as evidenced by General Motors' construction of a new, lower emission facility. The revision required compliance with the applicable national standard by the Congressionally mandated attainment date.

The United States in this case seems to rely on *dictum* of this Court in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975), to support the contention that notwithstanding the express state authority to adopt its own requirements without EPA involvement, the existing SIP stipulates the only applicable law until a revision is approved by both the state and EPA. Brief for the United States in Opposition at 2 and 11. Such reliance is misplaced. While it may be accurate to state that a revision does not become part of the SIP which is enforceable by EPA until it is approved by both the state and EPA, and that timely EPA disapproval may preempt inconsistent state regulation for the future, the state is acting within its retained authority when it adopts a standard no less stringent than that under the existing SIP, and that new standard constitutes a legally binding obligation of persons subject to the jurisdiction of the state, enforceable by the state, as a matter of state law. Until such

time as EPA disapproves state revision regulations, the source is thus exposed to two enforcement directions: state (under its revised regulations) and EPA (under the existing SIP). The requirement that EPA act on state revisions within four months in part mitigates the potential dilemma and burden thus imposed on the source. In the absence of timely EPA disapproval, equity bars enforcement by EPA.

Moreover, *Train* is distinguishable from the instant case on its facts. This Court spoke in *Train* in the context of EPA action on a SIP variance, and placed emphasis on the source's right to seek court review of any disapproval. In the present case the EPA took no formal action for a protracted period of time. Until such time as the EPA did act, General Motors had no opportunity to seek court review of that action, but was bound to comply with Massachusetts law.

Moreover, federal preemption theory does not lead to the conclusion that the Massachusetts regulations are invalid in light of the standard contained in the existing SIP, as the United States apparently suggests by its citation of *Train*. Federal preemption of state law "is not to be lightly presumed." *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). In that case, this Court noted three instances in which federal law may preempt state law. Firstly, Congress may preempt state law expressly. Secondly, Congressional displacement intent may be inferred where a comprehensive scheme of federal regulation leaves no room for supplementary state regulation. Thirdly, federal law may preempt state law if the latter actually conflicts with the former. *Id.* Such conflict may arise because compliance with both is a physical impossibility, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or because state law stands

"as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

None of these instances applies in the context of the Clean Air Act. Congress has not expressly pre-empted the states except in those few areas enumerated in the Act. 42 U.S.C. § 7416. Other than in those, Congress has evinced its intention that the states retain authority. Congress has not legislated in such a way as to preclude supplementary state regulation. To the contrary, the scheme of the Clean Air Act contemplates state supplementary regulation. Lastly, absent appropriate EPA disapproval, the Massachusetts regulations do not actually conflict with federal law as they comport with its retention of state authority, imposing standards no less stringent than those contained in the existing plan. The fact that the Massachusetts regulations extend the compliance deadline of the existing SIP does not necessarily lead to a contrary conclusion. *See Florida Power & Light*, 650 F.2d at 587. Nor did the Massachusetts regulations hinder the attainment of Congressional objectives, as they did provide for the attainment of the national standard within the Congressional timetable. That EPA might have done things differently has no relevance in the context of preemption, as it is the objectives of Congress, not EPA, which are to be achieved.

C. The United States is Estopped from Enforcing the Existing SIP.

Under the state-federal relationship established by the Clean Air Act, state action can fall into one of three categories. Firstly, state action may be expressly excluded. 42 U.S.C. § 7416. Secondly, action may be taken under state police powers which existed under the

Constitution before enactment of the Clean Air Act, and which are retained by the state pursuant to Congressional intent. *Id.* Thirdly, state action may be taken in areas in which Congress has assumed federal authority, but has delegated that authority back to the states. *See* 42 U.S.C. § 7410(a)(1) (1982). Congress has delegated this authority to the states because of, and in acceptance of, their unique attributes as sovereigns, including their existing governmental and enforcement apparatus. State responsibility to establish, administer and revise SIPs falls within the third category. *See* 42 U.S.C. §§ 7407(a) and 7410 (1982); *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975).

State actions which fall within the third category are in the nature of federal actions. To the extent that they are taken by the states *qua* federal agents under Act of Congress, they are cloaked with federal authority unless such authority is revoked by or under the authority of Congress, and are of at least equal dignity with the actions of EPA. In the circumstances of this case, Massachusetts was acting in part as an agent of the federal government under authority delegated to it by Congress. 42 U.S.C. §§ 7410.

The concept of the states acting as agents of the federal government has been recognized in the context of environmental legislation. In *Arnold Irrigation District v. Department of Environmental Quality*, 79 Or. App. 136, 717 P.2d 1274 (1986), the Court of Appeals of Oregon noted that the states, in passing on applications for certificates under the federal Clean Water Act, 33 U.S.C. § 1341 (1982), "act in part as agents of the federal government." 717 P.2d at 1278, n.4. *See also, W.W. Dean & Assocs. v. City of San Francisco*, 188 Cal. App. 3d 1330, 234 Cal. Rptr., 51, 58 (1987) (city acted as an administrative agent of the state and federal

governments in implementing the Endangered Species Act, 16 U.S.C. § 1531 (1982)); *but see Mianus River Preservation Committee v. Administrator, Environmental Protection Agency*, 541 F.2d 899, 906 (2d Cir. 1976) (states not relegated to the status of enforcement agents for the executive branch of the federal government under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1369(b)(1)(F)(Supp.IV), and therefore free to enact requirements no less stringent than the federal standards.)[2]

The concept of non-federal persons acting as federal agents has been recognized by this Court in other contexts. In *Dixson v. United States*, 465 U.S. 484 (1984), this Court held officers of a private non-profit corporation administering and expending federal development block grants to be "public officials" acting "for or on behalf of the United States" for purposes of the federal bribery statute, 18 U.S.C. § 201(a) (1982).

This Court has never decided that the United States may not be estopped. The Court has declined to state a rule that

> there are *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealings with their Government.

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[2]Far from relegating the states to a subsidiary role, the Clean Air Act elevates the states by insulating them from claims of federal preemption when acting within the scope of the authority delegated by Congress. In exercising their delegated authority, the states are acting as agents of the Congress, not as agents of the executive branch. *Cf. Mianus*.

Heckler v. Community Health Services of Crawford, 467 U.S. 51, 60-61 (1984) (emphasis in original).

Estoppel requires the reasonable reliance by one party, to its detriment, upon the misrepresentations of another. *See Lyng v. Payne*, 476 U.S. 926 (1986); *Heckler* at 59; *United States v. Arkwright, Inc.*, 690 F. Supp. 1133 (D.N.H. 1988). In the present case, General Motors relied upon representations made on behalf of and under the authority of the United States by EPA and Massachusetts. Those representations were made in EPA's 1981 release, in the revisions granted by Massachusetts in 1985, by EPA's failure to disapprove the revisions in a timely fashion and by EPA's continuing negotiations with Massachusetts and General Motors after approval by Massachusetts of its revisions.[3]

Such reliance was reasonable given the level of authority at which representations were made to General Motors. This is not a case in which General Motors relied upon representations of an agent of dubious authority. *Cf. Heckler*; *Arkwright*. General Motors relied on EPA's guidelines published in the Federal Register, and on formal actions taken by the Commonwealth of Massachusetts on behalf of the United States pursuant to authority delegated directly to it by Congress in the Clean Air Act.[4] Moreover, that this reli-

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[3]Even if the nature of the state's actual authority as agent is characterized as constrained in some way by a requirement of EPA approval, EPA ratified the Massachusetts revisions by its actions and by its failure to timely disapprove the revisions in this case. In any event, so far as the regulated source is concerned, the state acted within the scope of its apparent authority as agent.

[4]In addition, such actions were taken by Massachusetts on its own behalf, *qua* state, under its retained police powers.

ance was reasonable in the absence of disapproval of the Massachusetts revisions by EPA, at least after the expiration of the four month period, is supported by the significance attached to the four month period by the courts in *American Cyanamid Co. v. EPA*, 810 F.2d 493 (5th Cir. 1987), *Duquesne Light Co. v. EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983), *Council of Commuter Orgs. v. Thomas*, 799 F.2d 879, 888 (2d Cir. 1986); and *United States v. Alcan Foil Prods.*, 694 F. Supp. 1280 (W.D. Ky. 1988), *aff'd in part and rev'd in part*, 889 F.2d 1513 (6th Cir. 1989).

General Motors' detriment is evidenced by its expenditure of over $200 million on a new facility and its closing of the Framingham plant, which were actions taken by General Motors in reliance on the Massachusetts revisions.

General Motors' right to equitable relief is not outweighed by any public interest in belated enforcement by EPA. *Cf. Arkwright*. The public interest has been fully served by the actions of the Commonwealth of Massachusetts on behalf of the public, and by timely compliance with the NAAQS by General Motors before the Congressionally mandated attainment date, and before EPA instituted its enforcement action.

CONCLUSION

EPA enforcement of the existing SIP is barred in this case as a result of EPA's failure to exercise its duty to timely disapprove the Massachusetts revisions. Equitable principles also bar enforcement to protect the regulated source from the iniquitous results of inconsis-

tent enforcement powers of two sovereigns, and by the application of estoppel.[5]

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January 18, 1990

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[5]The intention of Congress that the federal courts should exercise equity jurisdiction in the context of granting modifications of requirements to avoid hardship under the Clean Air Act is evinced by the Act itself. *See* 42 U.S.C. § 7410(i); Currie, *Relaxation of Implementation Plans Under the 1977 Clean Air Act Amendments*, 78 U. Mich. L. Rev. 155, 202 (1979).

No. 89-369

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IN THE

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UNITED STATES OF AMERICA,
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BRIEF AMICI CURIAE OF MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AMERICAN PETROLEUM INSTITUTE, CHEMICAL MANUFACTURERS ASSOCIATION, AND EDISON ELECTRIC INSTITUTE, ALABAMA POWER CO., *ET AL.*, IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. BACKGROUND: THE STATE IMPLEMENTATION PLAN REVISION PROCESS	5
II. THE FOUR MONTH DEADLINE IS A NECESSARY ASPECT OF EPA'S SECONDARY ROLE IN THE SIP PROCESS	9
III. THE FOUR MONTH DEADLINE IS REASONABLE AND ATTAINABLE	13
IV. THE AGENCY'S VIEW OF THE ENFORCEABILITY OF THE PRIOR PLAN IS INCONSISTENT WITH THE REMAINDER OF THE STATUTE	20
CONCLUSION	28

TABLE OF AUTHORITIES

Cases — Page

American Cyanamid Co. v. EPA, 810 F.2d 493 (5th Cir. 1987) 3, 7, 8, 15, 17, 26, 27
Bethlehem Steel v. EPA, 638 F.2d 994 (7th Cir. 1980) 19
Bowen v. Georgetown Univ. Hosp., —— U.S. ——, 109 S.Ct. 468 (1988) 26
Brock v. Pierce County, 476 U.S. 253 (1986) 12
Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973), *cert. denied sub nom. Big Rivers Electric Corp. v. EPA*, 425 U.S. 934 (1976) 14
Council of Commuter Organizations v. Gorsuch, 683 F.2d 648 (2d Cir. 1982) 3
Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983) 3, 7, 8
General Motors Corp. v. EPA, 871 F.2d 495 (5th Cir. 1989) 18, 19
Indiana and Mich. Elec. Co. v. EPA, 509 F.2d 839 (7th Cir. 1975) 14
Metropolitan Washington Coalition for Clean Air v. District of Columbia, 511 F.2d 809 (D.C. Cir. 1975) 21
New Jersey v. EPA, 626 F.2d 1038 (D.C. Cir. 1980) 14
NRDC v. EPA, 478 F.2d 875 (1st Cir. 1972) 21
Train v. NRDC, 421 U.S. 60 (1975) 5-7, 20-23
United States v. Alcan Foil Products, 889 F.2d 1513 (6th Cir. 1989) 3, 8, 12, 13, 15, 17, 18
United States v. Ford Motor Co., 814 F.2d 1099 (6th Cir. 1987), *cert. denied*, 484 U.S. 822 (1987) 21
United States v. General Motors Corp., 28 Env't Rep. Cas. (BNA) 1844 (N.D. Tex. 1988) 19
United States v. General Motors Corp., 876 F.2d 1060 (1st Cir. 1989), *cert. granted*, —— U.S. ——, 110 S.Ct. 537 (1989) 3, 8, 11-13, 18, 24, 26
United States v. General Motors Corp., No. 87-2068-Mc (D. Mass. May 16, 1989), *reversed*, 876 F.2d 1060 (1st Cir. 1989), *cert. granted*, —— U.S. ——, 110 S.Ct. 537 (1989) 20

TABLE OF AUTHORITIES—Continued

Page

United States v. Wheeling-Pittsburgh Steel Corp., 818 F.2d 1077 (3d Cir. 1987) 21
United States v. Zimmer Paper Products, Inc., No. IP 88-194-C (S.D. Ind. Dec. 5, 1989) 19

Statutes

5 U.S.C. § 553 (1982) 14
33 U.S.C. § 1251 *et seq.* (1982) 11
42 U.S.C. § 110(g) (1982) 24
Clean Air Act, 42 U.S.C. § 7401 *et seq.* (1982) ..... *passim*
42 U.S.C. § 7410 (1982) 20
42 U.S.C. § 7410(a) (1982) 6, 8-11, 14, 21, 23, 25
42 U.S.C. § 7410(c) (1982) 6, 9, 10, 23, 27
42 U.S.C. § 7410(d) (1982) 20, 25, 26
42 U.S.C. § 7413(a) (1982) 27
42 U.S.C. § 7413(d) (1982) 18, 20, 22
42 U.S.C. § 7416 (1982) 9, 23
42 U.S.C. § 7419 (1982) 22
42 U.S.C. § 7503(4) (1982) 27
42 U.S.C. § 7506 (1982) 27
42 U.S.C. § 7506(b) (1982) 23
42 U.S.C. § 7603 (1982) 27
42 U.S.C. § 7604 (1982) 23
42 U.S.C. § 7604(a) (1982) 8, 18

Administrative Actions

"Final Report of the Task Group in SIP Processing," October 1987 (incorporated in Notice of Procedural Changes, 54 Fed. Reg. 2214, 2215 n.2 (1989)) 15
44 Fed. Reg. 71,780 (1979) 17
46 Fed. Reg. 44,476 (1981) 14
47 Fed. Reg. 15,076 (1982) 17
47 Fed. Reg. 27,073 (1982) 14
48 Fed. Reg. 39,580 (1983) 17
51 Fed. Reg. 43,814 (1986) 17
53 Fed. Reg. 30,220 (1988) 9
53 Fed. Reg. 30,224 (1988) 9
53 Fed. Reg. 40,745 (1988) 18

TABLE OF AUTHORITIES—Continued

	Page
53 Fed. Reg. 46,636 (1988)	17
54 Fed. Reg. 36,307 (1989)	19
54 Fed. Reg. 40,130 (1989)	19
54 Fed. Reg. 2138 (1989)	15
54 Fed. Reg. 2214 (1989)	15, 16, 18
Legislative Materials	
House Debate on H.R. 3199, 95th Cong., 1st Sess., *reprinted in* 3 Legislative History of the Clean Water Act of 1977, 299	11
S. Rep. No. 95-127, 95th Cong., 1st Sess. 10 (1977)	10-12
Other	
R. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196 (1977)	22

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BRIEF AMICI CURIAE OF MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., AMERICAN PETROLEUM INSTITUTE, CHEMICAL MANUFACTURERS ASSOCIATION, AND EDISON ELECTRIC INSTITUTE, ALABAMA POWER CO., *ET AL.*, IN SUPPORT OF PETITIONER

INTRODUCTION

On behalf of their respective members, the Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA"), the American Petroleum Institute ("API"), Chemical Manufacturers Association ("CMA"), and Edison Electric Institute, Alabama Power Co., *et al.*, jointly submit this brief *amici curiae* in support of petitioner General Motors Corporation.[1]

[1] This brief is filed with the written consent of the parties, pursuant to Supreme Court Rule 36.1. Letters of consent are on file with the Clerk of the Court.

MVMA is a voluntary non-profit association of domestic companies engaged in the manufacture and sale of motor vehicles in the United States. MVMA's members assemble ninety-seven percent of the cars, trucks, and buses produced in the United States and operate more than three hundred manufacturing facilities.

API is a national trade association with over two hundred companies as members, representing all facets of the petroleum industry: exploration, production, transportation, refining, and marketing.

CMA is a trade association whose member companies produce, market, and use industrial chemicals. Its members make up more than ninety percent of the productive capacity for basic industrial chemicals in the United States.

Edison Electric Institute, Alabama Power Co., *et al.*, comprises fifty-nine individual electric utilities and three trade associations: Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. This umbrella group participates in major rulemaking and litigation under the Clean Air Act.

The members of MVMA, API, CMA, and Edison Electric Institute, *et al.*, operate a wide range of facilities, most of which are subject to local, state, and federal air pollution control regulations. Their members, therefore, have a stake in the outcome of this litigation. All four associations represent the interests of their respective members before government agencies, in Congress, and in the courts, frequently appearing as a party or *amicus curiae* in litigation involving important environmental issues.

With respect to the issues in this case, the collective interests of their members coincide with the interest of General Motors and with the public interest. Like General Motors, their members often find themselves struggling to determine the appropriate method of compliance with air pollution control regulations in the face of conflicting federal and state requirements. These conflicts arise directly from the failure of the Environmental Protection Agency ("EPA" or "Agency") to approve or disapprove a revision to a State Implementation Plan ("SIP") within the four month deadline established by statute.

In the decision below, *United States v. General Motors Corp.*, 876 F.2d 1060 (1st Cir. 1989), *cert. granted*, —— U.S. ——, 110 S.Ct. 537 (1989) (*"General Motors"*), the First Circuit Court of Appeals addressed two major issues: (1) whether the statutory four month deadline for EPA to take action when EPA reviews a SIP also applies to EPA's review of SIP revisions, and (2) if so, whether EPA may enforce the existing SIP when it has failed to timely take action on a SIP revision. We are not separately briefing the issue of the applicability of the four month requirement to SIP revisions. We rely on the arguments presented by General Motors on this issue and on the uniform holdings of the courts of appeals that have considered the issue.[2]

SUMMARY OF ARGUMENT

A bar on enforcement of the prior State Implementation Plan (SIP) is the only appropriate remedy for EPA's failure to reach a decision on a SIP revision within four months. EPA has deliberately used its enforcement authority in combination with delayed SIP reviews to overturn state pollution control decisions. In

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[2] *See United States v. Alcan Foil Products*, 889 F.2d 1513, 1518 (6th Cir. 1989); *United States v. General Motors Corp.*, 876 F.2d 1060, 1066 (1st Cir. 1989), *cert. granted*, —— U.S. ——, 110 S.Ct. 537 (1989); *American Cyanamid Co. v. EPA*, 810 F.2d 493, 495 (5th Cir. 1987); *Council of Commuter Organizations v. Gorsuch*, 683 F.2d 648, 651-652 n.2 (2d Cir. 1982). *See also Duquesne Light Co. v. EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983).

doing so, it has stepped outside the secondary role intended for it by Congress in the determination of local air pollution control strategies.

The First Circuit erred in fashioning a remedy for EPA's delay that would allow district courts to reach their own determination of the "reasonableness" of the delay. Congress specified the four month deadline to ensure that EPA would act consistently with its secondary role. The lower courts cannot substitute their judgment on what EPA's role should be or how long EPA's review should take.

EPA's own studies demonstrate that the four month deadline is reasonable and attainable. The Agency has failed to meet the deadline because, directly counter to Congressional intent, it has used the SIP review process to "micromanage" state decisions.

The four month deadline also serves a central role in the statute by preventing prolonged periods of inconsistency between state and federal law. The statute is premised on a complementary state and federal system. EPA's interpretation of the "applicable implementation plan" under which it may bring an enforcement action without regard to the four month deadline destroys this complementary relationship. It places individual sources in the untenable position of having to choose between compliance with state or federal law; it allows EPA to avoid its decisional responsibilities under the Act; and it is inconsistent with the remainder of the statute.

Finally, the Agency claims that unabridged enforcement powers are necessary to prevent a flood of improper SIP revisions. There is no factual basis for the Agency's concern. And even if there were, Congress has provided other sufficient mechanisms for the EPA to respond to such alleged, but unproven, state abuses.

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ARGUMENT

I. BACKGROUND: THE STATE IMPLEMENTATION PLAN REVISION PROCESS

The Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7401 *et seq.* (1982),[3] establishes a balanced federal-state regulatory partnership for the attainment and maintenance of national ambient air quality standards. This Court has already described the essential contours of the partnership: EPA has the responsibility for setting the national air quality standards, but it has only a "secondary role" in determining the source-by-source controls necessary to achieve the standards. The principal responsibility for that function rests with the states and local governments. *Train v. NRDC*, 421 U.S. 60, 79 (1975).

The SIP is the main building block of the Act and embodies the cooperative effort between the federal and state governments. In its most straightforward form, the Act envisions that the states will develop SIPs that contain the mix of control strategies that both best fit local needs and achieve the national standards; EPA will review and approve the SIP; and the particular measures contained in the SIP will then be enforceable as a matter of state and federal law.

The SIP, however, is not a static set of emission limitations and controls. Congress recognized that local needs and control strategies would evolve over time and that SIPs would have to change as well. The Act, therefore, contains several provisions either directing or allowing SIP revisions. In each of these provisions, the responsibility for developing the SIP revision rests squarely with the state, although EPA is given the opportunity, as a last resort, to promulgate a federal plan. The three principal provisions involve (1) SIP submissions in re-

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[3] All references herein to 42 U.S.C. are to the 1982 edition.

sponse to a change in a national ambient air quality standard, CAA § 110(a)(1), 42 U.S.C. § 7410(a)(1); (2) SIP revisions in response to a determination that the SIP "is substantially inadequate" to achieve the national standards, CAA § 110(a)(2)(H), 42 U.S.C. § 7410(a)(2)(H); and (3) SIP revisions initiated by the state—*e.g.*, to correct technical deficiencies in the SIP, to tighten or relax control requirements, or to encourage innovative technologies, CAA § 110(a)(3)(A), 42 U.S.C. § 7410(a)(3)(A).[4]

Because a SIP revision represents a change from the mutually agreed upon federal and state plan, it poses the potential for discordance between the applicable federal and state requirements.[5] Timely action by the Agency on a SIP revision is, therefore, not just a matter of Congress's general interest in expeditious environmental improvement; it is essential to preserve the complementary relationship between state and federal law under the Act.

The issue presented in this case involves the third category of SIP revisions outlined above: a SIP revision submitted by the state on its own motion. Under the statute, EPA has four months in which to approve or disapprove the state revision.[6] EPA "shall approve" the revision if it meets the basic requirements of the Act and has been adopted "after reasonable notice and public hearings." CAA § 110(a)(3)(A), 42 U.S.C. § 7410(a)(3)(A). Clearly, if EPA disapproves the revision within that time, the prior SIP remains in effect and the federal decision governs. *Train*, 421 U.S. at 92. As this Court noted in *Train*, "[v]ariances under section 110(a)(3) cannot be granted until first the state, and then the

[4] The corresponding federal promulgation authority is set forth at CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1).

[5] Indeed, the Act requires that a state "adopt," not simply propose, its SIP or SIP revision as a precondition to submittal to the Agency. CAA § 110(a)(1), 42 U.S.C. § 7410(a)(1).

[6] *See supra* n.2.

Agency, have determined that they will not jeopardize the standards." *Id.* at 93 n.28. The Act thus contemplates that a *decision* by EPA can override the state's determination on the appropriateness of specific emissions controls.

EPA, however, has struck upon a new mechanism for asserting federal control over state decisions. It delays decision on the SIP revision and, in the interim, brings an enforcement action against individual sources based on the prior SIP. Extending the rationale of *Train* to the breaking point, EPA takes the position that, unless and until it approves the state SIP revision, the prior SIP remains in effect and the Agency can enforce it—without regard to the four month limitation of section 110(a)(3)(A). In this fashion, through inaction on the state submission and through use of its enforcement authority, the Agency can exercise a "pocket veto" over the state's judgment on the appropriate emission limitations for particular sources. Congress never intended, and the statute does not countenance, this abuse of the SIP revision process.

Several circuits have addressed the issue of which remedy is proper when EPA has failed to take action on a SIP revision within the statutory four month period. Three different approaches have emerged.

The first court of appeals to address the issue was the D.C. Circuit, in *Duquesne Light Co. v. EPA*, 698 F.2d 456 (D.C. Cir. 1983). In *Duquesne*, the Court held that when EPA is delinquent in taking action on a revision, EPA must "hold the noncompliance penalty in abeyance pending final action on the SIP." *Id.* at 472. However, the Court limited the remedy by providing that if EPA ultimately rejects the SIP revision, the penalty should be calculated back to the four month deadline, with interest. *Id.*

In contrast, the Fifth Circuit in *American Cyanamid Co. v. EPA*, 810 F.2d 493 (5th Cir. 1987), held that the

proper remedy is to bar EPA from enforcing the original SIP until and unless it rejects the SIP revision. *Id.* at 502. The Fifth Circuit explicitly rejected the *Duquesne* limitation that would allow back calculation of penalties, stating that

> [t]he *Duquesne* holding provides little or no incentive to the EPA to abide by [section 110's] four month rule; the EPA loses nothing by its contumaciousness.

American Cyanamid, 810 F.2d at 499 (footnote omitted).

A third approach is found in the opinion below in this case, *General Motors*, 876 F.2d 1060. After rejecting the approaches of the D.C. and Fifth Circuits, the First Circuit formulated a rule under which the district courts must inquire into the reasonableness of EPA's failure to act and take that factor into account in determining the amount of penalties to be imposed. The Court also concluded that a citizen suit under CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2), to compel EPA action on a pending SIP revision provides a satisfactory alternative remedy.

The Sixth Circuit adopted a variation of the First Circuit "reasonableness" rule in *United States v. Alcan Foil Products*, 889 F.2d 1513 (6th Cir. 1989). The Sixth Circuit articulated a shifting burden of proof under that rule:

> If the source demonstrates that it has met the standards of the proposed revision, the government has the burden of justifying EPA's delay in acting on the proposal. The court must then balance the reasonableness of the delay against whatever prejudice the source is able to establish.

Id. at 1521.

The First Circuit in the decision below made three critical errors in analyzing the consequences of EPA's missing the four month deadline of section 110(a)(3)(A): the Court did not analyze the interrelationship between the four month deadline and the Congressional intent that EPA's role in the SIP process be "secondary"; it assumed without analysis that the four month deadline is unrealistic; and it did not relate its conclusion on the enforceability of the prior plan to the remainder of the statute. When these points are considered, it is clear that the Fifth Circuit was correct in concluding that an enforcement bar is necessary.

II. THE FOUR MONTH DEADLINE IS A NECESSARY ASPECT OF EPA'S SECONDARY ROLE IN THE SIP PROCESS

There are only two mechanisms explicitly set out in the statute that allow EPA to impose requirements more stringent than those adopted by a state.[7] First, EPA can promulgate its own plan under section 110(c), 42 U.S.C. § 7410(c); second, EPA can disapprove a state plan as specified in section 110(a), 42 U.S.C. § 7410(a).

Direct federal promulgation under section 110(c) is an authority that the Agency has rarely exercised.[8] And there are obvious reasons for the Agency's hesitance to

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[7] A state is not precluded from adopting more stringent regulations on its own. *See* CAA § 116, 42 U.S.C. § 7416.

[8] *See, e.g.*, 52 Fed. Reg. 45,466, 45,467 (1987) (In considering promulgation of Federal Implementation Plan ("FIP") for Maricopa and Pima Counties in Arizona, EPA recognized that "EPA must try to serve the general principles of the Clean Air Act, including the goal of minimizing the amount of federal intrusion into an area that is primarily the State's responsibility."); 53 Fed. Reg. 17,378, 17,380 (1988) (EPA cautioned, in the same matter, that statutory scheme prefers State plans to federal plans because "the implementation of air pollution control measures in an area is always facilitated if carried out at the State level, and clearly Congress intended such planning to be done by the States.") With respect to both Maricopa and Pima Counties, EPA ultimately concluded that promulgating a FIP would be unnecessary. 53 Fed. Reg. 30,220 (1988); 53 Fed. Reg. 30,224 (1988).

use this authority: it represents a clear intrusion on state prerogatives, it is a measure that has proven historically to be politically unpopular, and direct federal promulgation is resource intensive for EPA. The Agency's principal experiment with direct federal promulgation occurred in the mid-1970s when it mandated local transportation control measures, such as bridge tolls, parking surcharges, and gas rationing. This touched off a legal and political controversy that ended with Congress, in the 1977 Clean Air Amendments, stripping EPA of authority to require such transportation control measures. *See* CAA § 110(c)(2)-(5), 42 U.S.C. § 7410(c)(2)-(5).

The practical and legal restraints on direct federal promulgation dovetail with the Congressional division of responsibility between EPA and the states. Congress specifically intended that EPA *not* engage in "micromanagement" of SIPs:

> The Federal role must be one of support rather than control. The Federal Government does not have and will not have the resources required to do an effective job of running the air pollution control programs of the states. And yet the Federal Government can and must provide the technical information and enforcement assistance that states and localities need. Fulfilling this latter role effectively will protect and enhance air quality more than fulfilling the former role inadequately.

S. Rep. No. 95-127, 95th Cong., 1st Sess. 10, 10-11 (1977).

By making direct federal promulgation both a visible and difficult process, Congress provided an inherent check on any EPA tendency to "run" a state's air pollution control program. The four month deadline for SIP review serves a comparable function. Congress gave the states nine months to develop a SIP or SIP revisions under section 110(a)(1); it is not accidental that EPA was given less than half that time to serve its review function. The

limited scope of review which Congress intended EPA to perform is also reflected in the language of section 110(a)(2)(H), 42 U.S.C. § 7410(a)(2)(H), which contemplates that a SIP must be "substantially inadequate" before the Administrator may require revision. The guiding principle of the Clean Air Act and of other federal environmental statutes, such as the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1982), is that EPA should accept state-approved pollution control strategies as long as those strategies are not clearly outside the requirements of the statute.[9]

Congress recognized that "[t]he problem of air pollution exists at the state and local level. That is where the public understands the problem . . . . Public problems must be solved at the level of government most capable of dealing with them." S. Rep. No. 95-127, 95th Cong., 1st Sess. 10, 10 (1977). Congress did not intend for EPA to spend its resources poring over the details of state submissions or making particularized decisions for the states, and the four month deadline reflects that fact. Yet, as discussed in greater detail below,[10] that is what EPA has consciously done.

Both the First Circuit in *General Motors* and the Sixth Circuit in *Alcan* tacitly accepted the view that EPA's

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[9] In discussing the analogous issue of EPA review of state-issued discharge permits under the Clean Water Act, Congress made clear that the Administrator may not

> substitute his judgment for that expressed by the State in its proposed permit; EPA may object to a State proposed permit only in a case in which limitations and conditions of the State permit are clearly outside the guidelines and requirements of this act . . . . The role of the Administrator in reviewing state-proposed permits [is thus] analogous to that of a Federal Court reviewing the action of the administrative agency . . . .

House Debate on H.R. 3199, 95th Cong., 1st Sess. (statement setting forth the views of House conferees), *reprinted in* 3 Legislative History of the Clean Water Act of 1977, 299 at 346.

[10] *See infra* pp. 15-17.

missing the deadline amounted to only a procedural failure and concluded that "[t]he public should not suffer because of EPA's failures." [11] *Alcan*, 889 F.2d at 1520; *General Motors*, 876 F.2d at 1067. Both Courts contemplated a remedy for the failure in which a district court would weigh the "reasonableness" of EPA's delay. They apparently concluded that the public interest would be better served if EPA takes a "reasonable" amount of time reviewing the details of state SIP submissions. But that is not what Congress concluded. Congress reached the judgment that, in the long run, the national goal of clean air would be better served by EPA's playing a "secondary role" in the SIP development process. As the legislative history indicates, Congress believed that "[f]ulfilling this latter role [the secondary role] effectively will protect and enhance air quality *more* than fulfilling the former role [running state air programs] inadequately." S. Rep. No. 95-127, 95th Cong., 1st Sess. 10, 10-11 (1977) (emphasis added). The Courts below should not

[11] The Court of Appeals below cited *Brock v. Pierce County*, 476 U.S. 253 (1986), as support for its position. *General Motors*, 876 F.2d at 1068. But *Brock* is materially different from this case. In *Brock* the Government's failure to observe the deadline *did* amount to only a procedural failure. Because the statutory scheme at issue in *Brock* was not premised on the cooperative federalism model, the Government's delay did not compromise the basic structure of the statute established by Congress. Here, as the Fifth Circuit correctly pointed out in *American Cyanamid*, "[t]he issue . . . is not so much [the violation by the source] but the *default of the EPA in carrying out the congressional intent to work in close cooperation with the states* in implementing standards and enforcing the Clean Air Act. *American Cyanamid*, 810 F.2d at 500 (emphasis added).

Second, the misuse of funds in *Brock* was a completed act, not subject to extension by the Government's delay. Here, in contrast, the EPA's delay directly increases the source's exposure to potential penalties. Third, this Court in *Brock* considered whether the Government *waived* its right to recover the misused funds. The remedy in *American Cyanamid* for which we argue is not nearly as drastic as the waiver considered in *Brock*, because it does not bar EPA from ultimately disapproving a SIP revision, and it does not permanently bar enforcement of an existing SIP. *See infra* n.27.

have substituted their judgment on the public interest for Congress's.

Furthermore, it is difficult to structure a "reasonableness" test for EPA's delay unless there is a predicate determination of what EPA is supposed to be doing in its review. Nine months might be a reasonable period of time for extensive review of all the details of a SIP submission; it is not reasonable for the secondary role described by Congress. Congress specified the reasonable time for that function: four months. The result of a process in which every district court reaches its own assessment of EPA's proper role in SIP reviews is likely to be confusion and a muddied compromise under which EPA serves *neither* of its roles effectively.

The Courts below may have been influenced in reaching their conclusions by a sense that the four month deadline is unattainable. The First Circuit noted that "EPA inevitably will often miss the deadline," *General Motors*, 876 F.2d at 1067, and the Sixth Circuit queried whether "the requirement is unrealistic." *Alcan*, 889 F.2d at 1520. Both Courts were then led to seek a "less drastic" remedy than the enforcement bar. These concerns are misplaced. EPA is missing the deadline because it persists in attempting to manage state SIP revisions in minute detail, counter to Congress's express intent. Indeed, the filing of enforcement actions during the pendency of a SIP revision is part of a pattern of deliberate EPA activity in which the Agency seeks to override state decisions outside of the limited provisions specified in the Clean Air Act.

III. THE FOUR MONTH DEADLINE IS REASONABLE AND ATTAINABLE

The lower courts' perception that delay in the SIP review process is an "inevitability" is unsubstantiated and inaccurate. The delay is a matter of the Agency's own choice and its decision to use the SIP review process to assert control over state decisions in a manner that Congress rejected.

First, the four month deadline is not unrealistic. The Clean Air Act already specifies that a state's SIP revision must be adopted "after reasonable notice and public hearings." CAA § 110(a)(3)(A), 42 U.S.C. § 7410(a)(3)(A). The federal regulatory process is, therefore, not the only public airing of the issues involved in a SIP revision; in fact, the state process itself is a lengthy one, often taking years to complete.[12] EPA has chosen to proceed sequentially, rather than concurrently, with the state's public review process. But that is a choice the Agency has made, not one mandated by statute.

In the early 1980s, EPA initiated a program aimed at shortening the time for SIP review. 46 Fed. Reg. 44,476 (1981); 47 Fed. Reg. 27,073 (1982). A cornerstone of the program was a "parallel processing" approach under which the "State and EPA propose the regulation at the same time, announce concurrent comment periods, and jointly review the comments." 47 Fed. Reg. 27,073, 27,074 (1982). EPA found that the parallel processing approach resulted in a *total* time of 128 days for review, on average—almost exactly the statutory requirement. *Id.*[13] EPA, however, dropped its parallel processing program.[14]

The Agency did not return to the issue of shortening SIP review time until 1987—just after the Fifth Circuit's decision in *American Cyanamid*. At that point, the Agency commissioned a "senior level task group" to assess the problem of SIP delays and to make recommendations for change. Their report was completed in October 1987,[15] and the Agency made proposals to implement their recommendations in January 1989. 54 Fed. Reg. 2138 (1989); 54 Fed. Reg. 2214 (1989).

There are several aspects of the Agency's own analysis that deserve note in the context of this case. First, notwithstanding the then nearly uniform holdings of the courts of appeals that the Agency has a statutory obligation to review SIP revisions within four months,[16] EPA's internal target for reviewing SIPs was *14* months—a target that was often missed. 54 Fed. Reg. 2214, 2215 (1989). And the Agency gave no indication that it would even attempt to meet the statutory deadline.

Second, according to the senior level report, the average number of SIP submittals is 350 per year. Approximately fifty percent of these involve imposition of a new regulation, ten percent an administrative clarification, and twenty percent a source specific "relaxation."[17] Thus, contrary to EPA's intimations, the SIP review system is *not* flooded with states seeking to relax requirements. In fact, most SIP revisions involve *stricter* control requirements.

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[12] There has been dispute over whether EPA approval of SIP submissions constitutes rulemaking covered by the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1982). *Compare Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 170-71 (6th Cir. 1973), *cert. denied sub nom. Big Rivers Electric Corp. v. EPA*, 425 U.S. 934 (1976), *with Indiana and Mich. Elec. Co. v. EPA*, 509 F.2d 839, 846-47 (7th Cir. 1975). The Agency has, however, concluded that rulemaking is required, and the courts have accepted that conclusion. *See, e.g., New Jersey v. EPA*, 626 F.2d 1038 (D.C. Cir. 1980).

[13] This time period should not be construed as EPA's "best" attempt to comply with the four month requirement, because the Agency has maintained that the requirement does not apply to SIP revisions.

[14] To our knowledge, the EPA has never explained its decision to discontinue the parallel processing program.

[15] "Final Report of the Task Group in SIP Processing," October 1987 (hereinafter "Report"). This Report is a public document; it was included in the docket of the Agency's Notice of Procedural Changes, 54 Fed. Reg. 2214, 2215 n.2 (1989), and much of the Report was incorporated in that notice.

[16] At the time of the Agency's analysis, all circuits that had decided the issue held that the four-month rule applies to SIP revisions, with the apparent exception of the Sixth Circuit. The Sixth Circuit resolved that possible disagreement in *Alcan*, 889 F.2d at 1518, holding that the four month rule does apply to SIP revisions.

[17] The remaining twenty percent were either air quality control region "redesignations" or source specific actions other than "relaxations." Report, *supra* n.15, at Appendix D.

Third, the Agency identified the following three factors as a major cause of SIP review delay: "[i]nordinate concern for the consequences of individual decisions," "[e]xcessive EPA review," and "[u]ncertainty concerning the outcome of the process." 54 Fed. Reg. 2214, 2216-2217 (1989). In describing its "inordinate concern for individual actions," the Agency acknowledged that it has used the SIP review process to require that "all decisions . . . be similar state to state and source to source." *Id.* at 2216. This is, of course, the antithesis of local decisionmaking (within a broad federal framework) intended by Congress. Also, the Agency conceded that "the SIP process has been depended upon as a vehicle to identify, resolve, and articulate national [EPA] policy issues, often at the expense of timely decisionmaking," *id.*, and that the Agency's policy keeps shifting. The Agency termed this the "moving target syndrome": "a SIP may be under review at EPA for months and eventually be deemed inappropriate because it doesn't conform to a newly evolved policy, even though it conformed to the policy in place when it was submitted." *Id.* Finally, EPA identified as an additional cause of delay the Agency's "nurturing" relationship with the states. *Id.* at 2217. Because of the "nurturing" relationship, "Headquarters and Regional Office personnel are reluctant to formally reject [SIP] packages." *Id.*

This, then, is the SIP process that the Agency itself describes: it is one in which EPA is excessively concerned with individual SIP decisions and drives to impose uniform federal policy on the states, even as the policy keeps shifting. At the same time, though, EPA is unwilling to take direct action against the state—either because of its "nurturing" relationship or because of the political controversy that confrontation would create. Instead, EPA *indirectly* confronts the state's decisions by bringing enforcement actions based on the prior SIP against individual sources. The individual sources then

bear the burden of the "moving target syndrome" and the delay and indecision of EPA's SIP review process. This pattern is apparent in each of the enforcement cases that have involved the SIP delay issue.

For example, in *American Cyanamid*, Louisiana submitted its SIP revision, which contained a so-called "bubble" or "emissions trading" proposal, in July 1982.[18] At the time of submission, it was the Agency's expressed policy "to encourage use of emissions trades to achieve more flexible, rapid and efficient attainment of national ambient air quality standards." 47 Fed. Reg. 15,076 (1982). But the Agency was in the process of revising its policy, a policy that had already been through several different iterations. *See* 44 Fed. Reg. 71,780 (1979); 47 Fed. Reg. 15,076 (1982); 48 Fed. Reg. 39,580 (1983). It ultimately issued a new policy in December 1986. 51 Fed. Reg. 43,814 (1986). In the interim, it brought an enforcement action against American Cyanamid. Two years after the new policy was announced, six years after the enforcement action was brought, and presumably after the nurturing had run its course, the Agency finally moved to propose to disapprove the Louisiana submission. 53 Fed. Reg. 46,636 (1988).

Similarly, in *Alcan*, the state submitted its initial SIP revision based on an emissions trading approach in July 1982. In the face of EPA inaction on the revision, the state submitted a second revision in March 1986 specifically applying the bubble policy to the Alcan plant. EPA again failed to take timely action. Instead, in December 1986, it published the new policy regarding bubble plan reviews. 51 Fed. Reg. 43,814 (1986). Without taking any formal action on the revision or otherwise

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[18] Under the bubble, or emissions trading, concept, a plant can comply with site-wide emissions limitations by means of off-setting emissions at one source within the plant with extra reductions at another source within the plant. *See American Cyanamid*, 810 F.2d at 497.

dealing definitively with the state, the Agency then filed an enforcement action.[19] Two years after the second submission, in October 1988, the Agency finally proposed to disapprove the revision—citing the new policy as the basis for its proposed disapproval. 53 Fed. Reg. 40,745 (1988). And in *General Motors*, 876 F.2d 1060, the state submitted its SIP revision in December 1985, based on an EPA policy issued in 1981. The Agency used the same pattern of a changed policy,[20] delay in review of the SIP revision, and interim enforcement action to override the state's decision.

Nor are these the only examples. The Agency has used a similar approach in other contexts, such as delayed compliance orders. *See, e.g., General Motors Corp. v. EPA*, 871 F.2d 495 (5th Cir. 1989) (Texas issued a delayed compliance order, EPA failed to act on it within the statutory time period and filed a notice of violation against General Motors).[21] More generally, EPA has as-

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[19] Prior to EPA's commencement of an enforcement action against Alcan, the Air Pollution Control District of Jefferson County had commenced an action under CAA § 304(a), 42 U.S.C. § 7604(a), in an effort to resolve the stalemate with EPA over the SIP revision. As the *Alcan* Court observed, this proved a wholly ineffective "remedy," given that EPA's final ruling on the revision came three years after the section 304(a) suit was filed and after EPA commenced its enforcement action against Alcan. *Alcan*, 889 F.2d at 1521. This, we believe, demonstrates that the First Circuit's "unreasonable delay" remedy is ineffective.

[20] The *General Motors* case illustrates another aspect of EPA's SIP process that the Agency itself has admitted: "silent" policy changes or, as the Agency calls it, "informal communication." 54 Fed. Reg. 2214, 2217 (1989). Announced policies of the Agency, such as the 1981 Volatile Organic Compounds Policy on which General Motors and the Commonwealth of Massachusetts relied, are silently eroded or altered through informal decisions within the Agency.

[21] Section 113(d) of the Act authorizes states to issue delayed compliance orders ("DCOs") to sources and requires EPA to review DCOs within ninety days. CAA § 113(d), 42 U.S.C. § 7413(d). In an action that fits precisely the pattern of the case here, EPA dis-

serted that it has the authority to "reinterpret" an existing state SIP and to bring an enforcement action against a source based on its reinterpretation, regardless of whether the state agrees with its interpretation. *See, e.g.*, 54 Fed. Reg. 40,130 (1989); 54 Fed. Reg. 36,307 (1989) (EPA final rule approving revisions to Kentucky SIP).[22]

The common denominator of these actions is the Agency's attempt to reach beyond its secondary role and assert direct control over state decisionmaking. For the Agency, enforcement cases provide an appealing mechanism for achieving greater control because they allow the Agency to avoid confrontation with the state as well as

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approved the State DCO after it had expired by its own terms and after it had issued a Notice of Violation to General Motors. As the Fifth Circuit noted in that case, "[c]ommon sense suggests that something is amiss when an agency purports to disapprove an expired order after the fact." *General Motors Corp. v. EPA*, 871 F.2d at 504. *See also Bethlehem Steel v. EPA*, 638 F.2d 994 (7th Cir. 1980).

[22] When EPA approved the Kentucky SIP, it stated that Kentucky would be obligated to follow EPA's *"current and future interpretations of the Act's provisions and regulations as well as EPA's operating policies and guidance."* 54 Fed. Reg. 36,307, 36,308 (1989) (emphasis added). Thus, EPA asserts not only the authority to interpret the Act but also to make binding on the states its "interpretations, operating policies and guidance." These interpretations, policies and guidance documents have, for the most part, never been presented to the public or even to the states for comment. The Agency provides no opportunity to challenge these documents in court or before the Agency and does not maintain a public file of the interpretations, operating procedures and guidance that will have binding effect upon the state. Several federal courts have rejected this latest attempt by EPA to override state authority and have held that EPA cannot engage in *post hoc* reinterpretation of SIP requirements. *See, e.g., United States v. General Motors Corp.*, 28 Env't Rep. Cas. (BNA) 1844 (N.D. Tex. 1988) (Court disallowed EPA's after-the-fact reinterpretation of a disputed provision in the Texas SIP). *See also United States v. Zimmer Paper Products, Inc.*, No. IP 88-194-C (S.D. Ind. Dec. 5, 1989).

the rulemaking restrictions of section 110. But it is that very appeal that underscores how the approach is inconsistent with the statute. Congress did not intend that it be easy for EPA to override state decisionmaking. As the District Court below pointed out, Congress gave the Agency the "trump card" in dealing with the states: it can always disapprove the SIP and begin enforcement action or it can promulgate a federal plan. *United States v. General Motors Corp.*, No. 87-2068-Mc (D. Mass. May 16, 1989), *reversed*, 876 F.2d 1060 (1st Cir. 1989), *cert. granted*, —— U.S. ——, 110 S.Ct. 537 (1989). The enforcement bar does not take the trump card away; it only forces the Agency to play it under the terms and conditions Congress created in recognition of the importance of state decisionmaking.

The four month deadline is reasonable and attainable, contrary to the assumption of the First and Sixth Circuit Courts. EPA's own studies prove this. EPA has elected to scrutinize SIPs and SIP revisions to a degree never contemplated by Congress and not authorized by the Act, and EPA resists any effort to limit its ability to do so. For this reason, the approach of the First and Sixth Circuits is fatally flawed.

IV. THE AGENCY'S VIEW OF THE ENFORCEABILITY OF THE PRIOR PLAN IS INCONSISTENT WITH THE REMAINDER OF THE STATUTE

At bottom, the Agency's argument for its enforcement authority rests on the following syllogism: (1) A SIP remains in effect as the "applicable implementation plan" until EPA approves a revision; (2) EPA can bring an enforcement action for violation of an "applicable" plan under section 113; and (3) therefore, EPA can bring enforcement actions against individual sources without regard to the SIP revision and the four month deadline. This argument melds the Court's decision in *Train* with a mechanical reading of section 110(d) of the Act

(which defines "applicable implementation plan") in a way that distorts the meaning of both.

This Court in *Train* set out a straightforward principle: a SIP revision does not become effective until EPA approves it. *Train*, 421 U.S. at 92. But this Court did *not* consider the effect of EPA delay past four months on that statutory principle.[23] Indeed, this Court noted on a related matter that "[w]e cannot and do not attempt to foresee, at this stage in the administration of the statute, all of the questions, to say nothing of the answers, that may arise . . . ." *Id.* at 93 n.28.

In *Train*, the Court considered whether the states and EPA may use their section 110(a)(3) revision powers, rather than other more cumbersome provisions of the Act, to grant site-specific relief. The language in *Train* often relied on by the Agency for the proposition that the existing SIP remains the "applicable" plan even four months after the state has submitted a proposed revision was not directed to the situation here. This Court noted:

> Should either [the State or EPA] *determine* that granting the variance would prevent attainment or maintenance . . ., the polluter is presumably within his rights in seeking judicial review. *This* litigation, however, is carried out on the polluter's time . . . for during *its* pendency the . . . failure to comply may subject him to a variety of enforcement procedures.

Id. at 92 (emphasis added).

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[23] The other cases typically relied on by the Agency for the principle that a SIP revision does not become effective until approved by EPA are similarly not dispositive of the issue presented here. *See United States v. Ford Motor Co.*, 814 F.2d 1099, 1102 (6th Cir. 1987), *cert. denied*, 484 U.S. 822 (1987); *United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1084 (3d Cir. 1987); *Metropolitan Washington Coalition for Clean Air v. District of Columbia*, 511 F.2d 809, 812 (D.C. Cir. 1975); *NRDC v. EPA*, 478 F.2d 875, 886 (1st Cir. 1972). Not a single one of these cases involved an EPA enforcement action brought in the face of a SIP revision left pending for more than four months.

This statement was clearly directed at a situation in which EPA *has* disapproved a revision and the source then appeals that action. *Id.* It does not address the situation where neither the state nor the source has received a decision from EPA on the SIP revision. In fact, the Court in *Train* took comfort from the Agency's own assertions that it would have no difficulty meeting its statutory responsibilities. *Id.* at 93.

The Agency has taken *Train*'s straightforward principle and converted it to a statutory license to ignore the four month deadline and to undercut state decisionmaking through enforcement actions. As a result, the statutory concept of the "applicable implementation plan" is stretched beyond recognition. The statutory structure of the Clean Air Act is built upon a matching of state and federal law in the SIP. As the Agency's experience with transportation control plans demonstrates, discordance between state and federal law creates severe practical, political, and legal problems. *See generally*, R. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196 (1977). The statutory deadlines in the Act governing EPA's SIP review authority serve a critical function not only in setting the appropriate level of EPA involvement, but also in limiting the time during which there is a state command in conflict with a federal command.[24]

This limitation on the window of potential conflict—four months in the case of SIP reviews—provides sources with some certainty with respect to their compliance obligations and sets the framework for the Act's cooperative federalism. Most importantly, the Act simply does not contemplate extended periods of time where state and

[24] Similar functions are served by time deadlines governing EPA review of delayed compliance orders under CAA § 113(d), 42 U.S.C. § 7413(d), and primary nonferrous smelting orders under CAA § 119, 42 U.S.C. § 7419.

federal law differ under the "applicable" SIP.[25] EPA's misapplication of the *Train* principle creates not only equitable concerns but also fundamental confusion in the basic statutory structure.

For example, the Act requires, as a condition for the approval of a SIP, that the emission limitation it contains be enforceable as a matter of state law. CAA § 110(a)(2)(D) and (F), 42 U.S.C. § 7410(a)(2)(D) and (F). Yet in order to submit a SIP revision, the state must *adopt* the revised requirement (*see supra* n.5), thus directly affecting the enforceability, as a matter of state law, of the prior SIP. In section 176(b) of the Act, Congress directed EPA to cut off grants under the Act to a state that "is not implementing any requirement of an approved or promulgated plan under section 7410 of this Title." CAA § 176(b), 42 U.S.C. § 7506(b). Congress used mandatory language for this provision: "the Administrator *shall* not make any grants under this chapter" if the state is not implementing the applicable plan. *Id.* (emphasis added). Does this mean that after the four month review period has passed without EPA decision, the *state* is subject to a funding cutoff? It is no answer to say that EPA would never take such an action penalizing a state for the Agency's own delay. Under section 304 of the Act, citizens can sue to enforce this mandatory duty. CAA § 304, 42 U.S.C. § 7604.

The funding sanctions, mandatory duties, and citizen suit provisions in the Act presume a clarity in the determination of the "applicable plan" that EPA's approach destroys. At a minimum, the structure of the statute is premised on prompt decisions by EPA harmonizing federal and state obligations. Under EPA's theory, a source would be subject to a citizen suit throughout the

[25] Exceptions to this rule occur in the context of Federal Implementation Plans (FIPs), CAA § 110(c), 42 U.S.C. § 7410(c), and "more stringent" state laws, CAA § 116, 42 U.S.C. § 7416.

period of EPA's delay. And this would be true even if the Agency intended to approve the plan. This, in and of itself, would chill SIP revisions and hence discourage states from adopting (and sources from accepting) control limitations on the edge of technological feasibility.[26] States and sources would know that any relief from those standards would be highly problematic given the likelihood of EPA delay and the possibility of citizen suits. The very act of delay by EPA would thus hold states (and sources) hostage to potential citizen suits.

In addition, under EPA's reading, individual sources are faced with an intolerable Hobson's choice. SIP revisions cannot always be neatly categorized as more or less stringent than the prior SIP. It is often the case, for example, that a state will revise its SIP to tighten an emission limitation but provide the necessary addi-

[26] It should be noted here that the First Circuit misread section 110(g) of the Act in suggesting that this section evidences Congress's understanding that EPA may enforce a prior SIP after the four month review period has passed. CAA § 110(g), 42 U.S.C. § 7410(g). *General Motors*, 876 F.2d at 1069 n.6. Section 110(g) provides that a state may issue a "temporary emergency suspension" of the prior SIP if the state has submitted a SIP revision "which the Administrator has not approved or disapproved under this section *within* the required four month period . . . ." CAA § 110(g)(1), 42 U.S.C. § 7410(g)(1) (emphasis added). The state's authority under the section is limited to situations of severe economic emergency, and the suspension can only last for four months. The First Circuit assumed that this suspension authority dealt with situations in which EPA had missed the four month deadline, and, therefore, concluded that the enforcement bar is inconsistent with the section. In fact, though, section 110(g) deals with the state's authority to suspend its prior SIP *within* EPA's four month review period. The section thus provides a very limited entitlement to the states to take action before EPA has had its chance to review the SIP revision. The First Circuit's reading both ignores the statutory term "*within* the required four month period" and renders the emergency authority hollow, since the "emergency suspension" could not take effect until four months after submission, hardly an expeditious, "emergency" time frame.

tional time to meet that tighter limit. What are the source's compliance obligations under these circumstances as EPA delays? EPA's statutory approach leaves the source in the dark for an extended period of time and effectively gives greater statutory weight to EPA's inaction than to the state's deliberate decision.

We raise these questions to illustrate a basic point: the statutory definition of "applicable implementation plan"—which explicitly references revisions that "[have] been *approved under subsection (a)*," CAA § 110(d), 42 U.S.C. § 7410(d) (emphasis added)—must, if the statute is to make sense, incorporate the time deadlines of that subsection. The statutory term "has been approved under subsection (a)" refers to more than a single temporal event, approval, that binds the state to federal law; it also refers to EPA's authority *and* obligation under the subsection to act in a specified manner toward the state. The authority to disapprove cannot be split from the correlative obligation to decide. Otherwise, the limited and manageable window of potential federal/state conflict becomes a broad gash in the statute, and the parallel enforcement authorities of the federal and state government would be skewed in favor of the federal government.

Under either the statutory or common sense understanding of the term, as EPA delays years in the review of a SIP revision, the state is not remiss in its duty to enforce the "applicable" plan; it is not subject to a funding cutoff any more than the individual source is subject to an enforcement action. The *dual* actions of the state, in submitting the revision, and EPA, in failing to meet its review obligations under section 110(a)(3)(A), have compromised the foundation of the applicability of the prior plan.[27] Once outside of the statutorily allowed four

[27] This would not mean, however, that EPA's delay renders any subsequent Agency approval (or disapproval) invalid. It is only

month period, unless and until the Agency acts on the state's submission, the prior plan cannot be considered "applicable" within the meaning of section 110(d).

This reading of section 110(d) is the one most consistent with the remainder of the statute and reinforces the correctness of the enforcement bar approach of *American Cyanamid*. Moreover, any approach which would permit retroactive application of EPA's action, such as the approach of the D.C. Circuit in *Duquesne*, is inconsistent with the doctrine that a statutory grant of legislative rulemaking authority shall not be construed to convey the power to apply retroactive rules unless the statute expressly provides. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, —— U.S. ——, 109 S.Ct 468 (1988) Here, the statute does not provide for retroactivity, and it would be manifestly unfair to allow substantial accumulation of penalties against individual sources based on EPA's non-compliance with the statute.[28]

Finally, the Agency argues that its interpretation is necessary to fend off attempts by the states to enact improper relaxations of Clean Air standards. In the First Circuit, the Agency argued that with the enforcement bar, "states might simply flood the Agency with disingenuous SIP revisions at the behest of influential companies." *General Motors*, 876 F.2d at 1067. Not only is this argument a disservice to the states, but it is also factually unsupported. In the two and a half years that *American Cyanamid* has been the governing precedent in the Fifth Circuit, we are not aware of, and EPA has not pointed to, any increase in "disingenuous" SIP revisions,

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during the period of delay, when EPA has failed to meet its decisional obligation under section 110(a)(3)(A), that the "applicability" of the plan is compromised.

[28] Also, as discussed, it will often not be clear to the source whether the Clean Air Act requires compliance with the revised state law or the prior SIP.

never mind a "flood" of such revisions. But even if EPA's self-serving specter of state irresponsibility were accepted, Congress provided EPA with broad authorities that would directly address that problem. EPA can assume federal enforcement of the state plan, CAA § 113(a)(2), 42 U.S.C. § 7413(a)(2); it can promulgate a federal plan in place of the state plan, CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1); it can cut off grants to the state, CAA § 176, 42 U.S.C. § 7506; it can ban the construction of any new or modified major source in the area, CAA § 173(4), 42 U.S.C. § 7503(4); it can bring an action to halt any imminent endangerment, CAA § 303, 42 U.S.C. § 7603; and, of course, it can disapprove any revision and bring an enforcement action against the individual source. With this array of authorities, it is nothing short of ridiculous for the Agency to claim that it needs the threat of enforcement during the pendency of delayed SIP review to stem the tide of improper SIP revisions.

It should be emphasized that the *American Cyanamid* rule places only a limited restriction on the Agency's authority: the Agency cannot enforce a prior SIP where a SIP revision has been pending for more than four months until it disapproves that revision, and it cannot collect penalties for the period of its own delay. These restrictions are entirely within the Agency's ability to control, and, as discussed, there is no sound reason why the Agency cannot meet the four month deadline. The Congressional mandate here is straightforward: EPA must act on state submissions within four months. This Court should hold the Agency to that requirement.

CONCLUSION

For these reasons, the *amici curiae* respectfully urge this Court to rule that when EPA fails to take action on a SIP revision within the four month period for review, then (1) EPA may not bring an enforcement action for failure to comply with an existing SIP unless and until it rejects the pending SIP revision, and (2) EPA may not collect penalties for the period between (a) the end of the four month period for review and (b) the date that EPA rejects the revision.

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In The

Supreme Court of the United States

October Term, 1989

GENERAL MOTORS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The First Circuit

BRIEF OF GOLDEN WEST REFINING COMPANY, ENVIRONMENTAL AUDIT, INC., AND SECURITY ENVIRONMENTAL SYSTEMS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT

I THE CLEAN AIR ACT ESTABLISHES A FEDERAL – STATE PARTNERSHIP FOR THE PROTECTION OF OUR NATION'S AIR..... 3

A. CONGRESS GAVE THE STATES THE AUTHORITY TO MODIFY FEDERALLY APPROVED AIR POLLUTION CONTROL REGULATIONS OR PROVIDE TEMPORARY RELIEF FROM THEM 4

B. THE CLEAN AIR ACT IMPOSES A REQUIREMENT THAT EPA DECIDE IN A TIMELY FASHION TO APPROVE OR DISAPPROVE STATE – ISSUED SIP REVISIONS 6

II THE FAILURE OF EPA TO APPROVE OR DISAPPROVE DCOs AND SIP REVISIONS WITHIN THE STATUTORY TIME LIMITS INFRINGES UPON THE AUTHORITY OF THE STATES, LEAVES THE REGULATED COMMUNITY IN LIMBO, AND DEPRIVES THE PUBLIC OF AN OPPORTUNITY TO PARTICIPATE IN THE PROCESS 8

A. THE AUTHORITY OF THE STATES IS USURPED BY THE EPA'S FAILURE TO ACT WITHIN THE STATUTORILY DEFINED LIMIT 9

B. THE REGULATED COMMUNITY IS PLACED IN COMPLIANCE LIMBO 11

TABLE OF CONTENTS – Continued

Page

C. MEMBERS OF THE PUBLIC ARE DEPRIVED OF THEIR ABILITY TO PARTICIPATE IN THE PROCESS 16

III ONLY THE CASE LAW IN THE FIFTH CIRCUIT IS CONSISTENT WITH THE STATUTORY SCHEME OF THE ACT 17

A. THE RULE IN THE FIFTH CIRCUIT IS CONSISTENT WITH LEGISLATIVE INTENT 18

B. THE RULES IN THE D.C., FIRST AND SIXTH CIRCUITS ARE BASED UPON ERRONEOUS ASSUMPTIONS 20

1. *The approach of the First and Sixth Circuits ignores the practicalities of air pollution control compliance under the Congressional scheme* 26

2. *The practical results of the approaches taken by the various circuits can be clearly contrasted* 27

IV. CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

American Cyanamid v. U.S. Environmental Protection Agency, 810 F.2d 493 (5th Cir. 1987) 7, 19

Bethlehem Steel Corporation v. Gorsuch, 742 F.2d 1028 (7th Cir. 1984) 7, 12, 16

Bethlehem Steel Corporation v. United States Environmental Protection Agency, 638 F.2d 994 (7th Cir. 1980) 7, 17

Council of Commuter Organizations v. Gorsuch, 683 F.2d 648 (2d Cir. 1982) 7, 17

Council of Commuter Organizations v. Thomas, 799 F.2d 879 (2d Cir. 1986) 7, 14, 17, 18

Duquesne Light Company v. Environmental Protection Agency, 698 F.2d 456 (D.C. Cir. 1983) 7, 8, 14, 18, 21

General Motors Corp. v. Environmental Protection Agency, 871 F.2d 495 (5th Cir. 1989) .. 7, 13, 19, 20, 21

Hallstrom v. Tillamook County, ___ U.S. ___, 110 S.Ct. 304 (1989) 9, 10, 28

Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975) 4, 10, 22

Union Electric Company v. Environmental Protection Agency, 427 U.S. 246 (1976) 3, 4, 22

United States v. Alcan Foil Products, 889 F.2d 1513 (6th Cir. 1989) 7, 8, 14, 20, 21, 23

United States v. General Motors Corporation, 876 F.2d 1060 (1st Cir. 1989) 7, 20, 22

TABLE OF AUTHORITIES – Continued

Page

United States v. Mobil Oil Corporation, pending in U.S. District Court, Eastern District of California, No. 87-0627 LKK..... 11

United States v. National Steel Corp., 767 F.2d 1176 (6th Cir. 1985)..... 7

FEDERAL STATUTES

Clean Air Act

42 U.S.C. § 7401(a)(3)..... 3

§ 7401 *et seq.*..... 3

§ 7407(a)..... 3, 24

§ 7410..... 5, 19

§ 7410(a)(1)..... 16

§ 7410(a)(2)..... 4, 6, 9

§ 7410(a)(2)(A)-(K)..... 4, 5

§ 7410(a)(3)(A)..... 4, 5, 6, 9, 16

§ 7410(g)(1)..... 6, 9

§ 7413..... 5, 6, 19, 26

§ 7413(a)(1)..... 25

§ 7413(b)..... 25

§ 7413(d)..... 5, 19

§ 7413(d)(1)(A)..... 16

§ 7413(d)(2)..... 5, 6, 9, 17

§ 7420..... 18, 19, 26

§ 7602(j)..... 6

TABLE OF AUTHORITIES – Continued

Page

§ 7604..... 24

§ 7604(a)..... 14

§ 7604(a)(2)..... 14, 18

§ 7607(b)(1)..... 16

Act of December 17, 1963, Pub. L. No. 88-206, § 1, 77 Stat. 392..... 3

CALIFORNIA STATUTES

Cal. Health & Safety Code § 39602..... 24

§ 40702..... 23

§§ 41650-41652..... 24

§ 41650(a)..... 23

§ 42400..... 24

§§ 42400.1-42403..... 24

REGULATIONS

40 C.F.R. § 51.100..... 5

§ 51.104..... 5

§ 51.105..... 5

§ 65.03(a)(1)..... 5

§ 66.3..... 18

§ 66.3(c)(1)..... 18

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIAL

H.R. Rep. No. 95-294, 95th Cong., 1st Sess. (1977) *reprinted in* 1977 U.S. Code Cong. & Ad. News 1077 5

TREATISES

Selmi and Manaster, *State Environmental Law*, § 6.02[1][b] at 6-7 (1989).....5, 26

Novick *et al.*, *Law of Environmental Protection*, § 6.01 at 6-3, 6-4 (1987)..... 23

MISCELLANEOUS

50 Fed. Reg. 36732-36733 (1985)..... 7

Marvin Durning, Assistant Administrator for Enforcement, to Regional Administrators and Regional Enforcement Directors, "Enforcement Under Clean Air Act Amendments – Orders under Section 113(a) and 113(b)", July 27, 1978 13

"Source Specific SIP Revisions", July 29, 1983 21

"Clean Air Act Stationary Source Civil Penalty Policy," September 12, 1984..... 25

"Settlement of Noncompliance Penalties Under Section 120 of The Clean Air Act," October 30, 1980, and April 2, 1981..... 25

Dante, *The Divine Comedy: Hell*, Canto IV 11, 12

With consent of the parties, Golden West Refining Company, Environmental Audit, Inc., and Security Environmental Systems, Inc. submit this *amicus curiae* brief in support of the Petitioner.

STATEMENT OF INTEREST

Golden West Refining Company, Environmental Audit, Inc., and Security Environmental Systems, Inc. submit this *amicus curiae* brief in support of appellant General Motors Corporation.[1]

Golden West Refining Company ("Golden West"), a California corporation, is engaged in the refining of petroleum and the distribution of refined petroleum products. Golden West operates a 45,000 barrel per day refinery in Santa Fe Springs, California.

Security Environmental Systems, Inc. ("SES") is a Delaware corporation engaged in the business of incinerating classified documents and biohazardous wastes. SES is currently engaged in the process of securing permits for and constructing a hazardous waste incineration facility in Vernon, California.

Environmental Audit, Inc. ("EAI") is a California corporation which provides environmentally related consulting services to clients located throughout the United States. These services include assisting in the permitting of facilities and identification of technologies for compliance with applicable air pollution control regulations.

Amici Golden West and SES operate facilities which are subject to numerous local, state, and federal air pollution control regulations. *Amicus* EAI attempts to assist sources to comply with local, state and federal air pollution control regulations. They therefore have a stake in the outcome of this litigation.

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[1] This brief is filed with the written consent of the parties, pursuant to Supreme Court Rule 37.3. Letters of consent are on file with the Clerk of the Court.

In the context of the issues at bench, the interests of *amici* coincide with the interest of General Motors and with the public interest in this matter. *Amici* often find themselves struggling to determine the appropriate method of compliance with air pollution control regulations in the face of conflicting federal and state requirements.

SUMMARY OF ARGUMENT

The Clean Air Act acknowledges the primary role of the States in developing and enforcing air pollution control laws within their individual borders. The federal government was given the responsibility for developing clean air goals and overseeing the States' attempts to reach these goals. One of the more significant vehicles created by Congress for achieving these goals was the State Implementation Plan ("SIP").

The States were to determine the strategies for achieving the clean air goals, choosing the approaches which best suited the particular circumstances within their borders and incorporating these strategies into a SIP. The States were also authorized by Congress to revise these plans as warranted by changing circumstances and to provide individual air pollution sources temporary relief from the mandates of the plans under limited circumstances. These revisions have independent authority under State law, apart from their role within the framework of the Clean Air Act. If the States' plans and revisions thereto met the requirements of the Act, Administrator of the Environmental Protection Agency ("EPA") was required to approve them.

EPA has unashamedly failed to approve or disapprove revisions within the deadlines mandated by Congress. At the same time, EPA seeks to penalize sources attempting in good faith to comply in a timely fashion with the requirements of the States' revisions. The EPA's lack of timeliness has undercut the designated and proper role of the States in developing and enforcing clean air laws within their borders. The EPA's actions seeking to penalize sources for not complying with old SIP requirements while revisions are pending places the

regulated community in a quandary as to the appropriate method of compliance.

The Clean Air Act does not delineate consequences for EPA's failure to timely complete its review of SIP revisions adopted by the States. The various Circuit Courts of Appeals have attempted to fashion a solution and, in so doing, they have come to conflicting conclusions. The remedy adopted by the Fifth Circuit, for dealing with EPA attempts to enforce SIP provisions while EPA review of revised provisions is past due, is the response which most closely reflects the intent of Congress. That remedy bars EPA enforcement against a source not complying with an old SIP provision until EPA has acted to disapprove a revised SIP provision.

ARGUMENT

I.

THE CLEAN AIR ACT ESTABLISHES A FEDERAL – STATE PARTNERSHIP FOR THE PROTECTION OF OUR NATION'S AIR

The proper role of the States in controlling air pollution within their respective borders was delineated by Congress in §§ 7401(a)(3) and 7407(a) of the Clean Air Act, 42 U.S.C. § 7401, *et seq*. Section 7401(a)(3) provides, in relevant part: "[t]hat the prevention and control of air pollution at its source is the *primary* responsibility of the States and local government. . . ."[2] [Emphasis added]. In determining the nature of emission limitations to be imposed within its borders, a State is free to select whatever controls it deems best suited for that State's particular needs. Industries with technological problems or particular economic concerns may seek special treatment in the plan in order to take these concerns into account. *Union Electric Company v. Environmental Protection Agency*, 427 U.S. 246, 266 (1976). The *only* limitation on a State's selection of controls is that they must comply with the criteria

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[2] This primary responsibility imposed upon the States predated the Clean Air Act of 1970. *See* Act of December 17, 1963, Pub. L. No. 88-206, § 1, 77 Stat. 392.

set forth in § 7410(a)(2)(A)-(K). "The Act gives the agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2) [§ 7410(a)(2)]." *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975).

While the States were given the primary responsibility for assuring air quality within their borders by developing and enforcing the SIPs, the federal government was given the responsibility of assuring that the SIPs met the requirements of the Clean Air Act. If the SIPs met these delineated requirements, the Administrator was required to approve them. *Union Electric*, 427 U.S. at 257. The Act required that this process of determining whether the initial SIPs met these enumerated requirements be accomplished within four months. 42 U.S.C. § 7410(a)(2). "No one can doubt that Congress imposed upon the Agency [EPA] and States a comprehensive planning task of the first magnitude which was to be accomplished in a relatively short time." *Train*, 421 U.S. at 68. The imposition of this "short time" SIP review process accomplished two objectives: it got the overall federal-state effort off to a fast start, and it minimized the time during which state air quality requirements would have binding force under state law but would not yet have the force of federal law.

A. CONGRESS GAVE THE STATES THE AUTHORITY TO MODIFY FEDERALLY APPROVED AIR POLLUTION CONTROL REGULATIONS OR PROVIDE TEMPORARY RELIEF FROM THEM.

In recognition of changes in technology, air pollution levels, economic circumstances, or other unforeseen factors within a State's borders, as well as a State's desire to accommodate the legitimate needs of a source or an industry operating at variance from an approved SIP, Congress provided that the plans can be revised by the State if the revisions meet the same standards required of original plans. *See* 42 U.S.C. § 7410(a)(3)(A). *Union Electric*, 427 U.S. at 267 n. 16. "Essentially a SIP is a constantly evolving conglomeration of

substantive and procedural regulations applicable to categories of air pollution sources, and supplemented by specific compliance schedules governing individual sources which are not meeting the regulations' terms." Selmi and Manaster, *State Environmental Law*, § 6.02[1][b] at 6-7 (1989).

Where a SIP revision is developed by a State, it is subject to the criteria listed in § 7410(a)(2)(A)-(K), the requirements of § 7410(a)(3)(A) and 40 C.F.R. §§ 51.100, 51.104 and 51.105. These requirements include the State's obligation to provide notice and public hearings upon the proposed SIP revision before it may be adopted by the State. If the SIP revision meets all the above-enumerated requirements, the Administrator is required to approve it. 42 U.S.C. § 7410(a)(3)(A).

Additionally, the 1977 amendments to the Clean Air Act added subsection 113(d) (42 U.S.C. § 7413(d)) providing for the States' issuance of delayed compliance orders ("DCOs"), a form of temporary relief from the requirements of a SIP, in order to affirm the role of the States as the primary authority for enforcement of SIPs. *See* H.R. Rep. No. 95-294, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1077, 1135-1136. The Administrator is required to approve a DCO if he determines it does not violate the requisites of the Act. 42 U.S.C. § 7413(d)(2). When approved by the Administrator, a DCO becomes part of the State's SIP. 40 C.F.R. § 65.03(a)(1).

The case pending before the Court addresses the appropriate remedy for the Administrator's failure to approve or disapprove a proposed SIP revision under § 7410 of the Act within the statutory four month limit. There are numerous other cases where the EPA has similarly failed to act upon proposed SIP provisions arising from DCOs issued under § 7413 of the Act within the 90 days mandated by the Act. This widespread pattern of EPA's disregard of its obligations to timely act upon all forms of state-granted relief, as provided for in the Clean Air Act, has resulted in many enforcement actions being initiated by the EPA against sources attempting to comply with the directives of state-issued SIP revisions and DCOs prior to EPA's determination of their

approvability. *Amici* believe the Court should be cognizant of this parallel concern involving proposed SIP provisions initiated as DCOs issued under § 7413 because the Court's decision in this case will likely be viewed by the lower courts as also influencing the outcome of enforcement actions initiated during the pendency of the DCO approval/disapproval process.

B. THE CLEAN AIR ACT IMPOSES A REQUIREMENT THAT EPA DECIDE IN A TIMELY FASHION TO APPROVE OR DISAPPROVE STATE – ISSUED SIP REVISIONS.

Consistent with its goal of assuring that progress did not fall victim to bureaucratic delay, Congress provided short deadlines for federal approval or disapproval of state-granted relief from SIP requirements. Under the terms of 42 U.S.C. § 7413(d)(2), a DCO for a "minor" source became immediately effective upon issuance by a State and only ceased to be effective upon express disapproval by the Administrator. The Administrator was only given 90 days to approve or disapprove a state-issued DCO for a "major" source.[3]

While the Clean Air Act does not separately state the time within which the Administrator must approve or disapprove a SIP revision, the Act does require approval or disapproval of an original SIP submitted by a State within 120 days of the Administrator's receipt of the State's plan. 42 U.S.C. § 7410(a)(2). Section 7410(a)(3)(A), dealing with revisions to SIPs, incorporates all the requirements of § 7410(a)(2). It must therefore be presumed that the 120-day deadline for acting, expressly contained in § 7410(a)(2), is also incorporated therein. Further evidence of Congressional intent is found at § 7410(g)(1), which discusses circumstances where

[3] A "major stationary source" is a stationary facility which emits or has the potential to emit 100 tons per year or more of any air pollutant. A "minor stationary source" emits or has the potential to emit less than this amount. 42 U.S.C. § 7602(j).

the Administrator has not acted on a SIP revision "within the required four month period."[4]

The weight of case law holds that the four month deadline for the Administrator to approve or disapprove original SIP submissions applies to SIP revisions as well. Every court that has expressly dealt with the issue has so held.[5] *See Duquesne Light Company v. Environmental Protection Agency*, 698 F.2d 456, 471 (D.C. Cir. 1983); *Council of Commuter Organizations ("CCO") v. Gorsuch*, 683 F.2d 648, 651 n. 2 (2d Cir. 1982); *Council of Commuter Organizations ("CCO") v. Thomas*, 799 F.2d 879, 888 (2d Cir. 1986); *American Cyanamid v. U.S. Environmental Protection Agency*, 810 F.2d 493, 495 (5th Cir. 1987); *United States v. General Motors Corporation*, 876 F.2d 1060, 1066 (1st Cir. 1989); and *United States v. Alcan Foil Products*, 889 F.2d 1513 (6th Cir. 1989).

Despite the legal mandate that EPA act in a timely fashion to approve or disapprove SIP revisions and DCOs, the actual practice of EPA is not in accordance with this mandate. Reported decisions demonstrate EPA's repeated and consistent failure to adhere to this statutory mandate of timeliness. *See, e.g., Bethlehem Steel Corporation v. United States Environmental Protection Agency*, 638 F.2d 994 (7th Cir. 1980); *CCO v. Gorsuch*, 683 F.2d 648; *United States v. National Steel Corporation*, 767 F.2d 1176 (6th Cir. 1985); *Bethlehem Steel Corporation v. Gorsuch*, 742 F.2d 1028 (7th Cir. 1984); *CCO v. Thomas*, 799 F.2d 879; *American Cyanamid*, 810 F.2d 493; *General Motors Corp. v. Environmental Protection Agency*, 871 F.2d 495 (5th Cir. 1989); *United States v. General*

[4] In a Federal Register notice relating to proposed regulations dealing with noncompliance penalties pursuant to § 120 of the Act, EPA acknowledged the four month limit applied to SIP revisions. 50 Fed. Reg. 36732 *et seq.* at 36733 (Sept. 9, 1985).

[5] The Sixth Circuit once suggested by way of dictum in a footnote that the four-month rule did not apply to SIP revisions. *United States v. National Steel Corp.*, 767 F.2d 1176, 1182-1183 n. 1 (6th Cir. 1985). That court later expressly rejected this suggestion and held the four-month rule did apply to SIP revisions. *U.S. v. Alcan Foil Products, infra.*

Motors, 876 F.2d 1060; and *United States v. Alcan Foil Products*, 889 F.2d 1513. *Cf., Duquesne Light v. EPA*, 698 F.2d 456. The foregoing list could surely be supplemented by unreported district court decisions and by federal enforcement actions resolved prior to or during litigation. It can be readily assumed that both large and small business entities have succumbed to the threat of such federal enforcement measures. Rather than absorb the substantial cost burden of challenging EPA's disregard of the statutory timetable, they have settled with EPA and paid monetary penalties. The clear message is that EPA has seldom, if ever, approved or disapproved a DCO or SIP revision within the 90 or 120 days mandated by Congress.

II.

THE FAILURE OF EPA TO APPROVE OR DISAPPROVE DCOs AND SIP REVISIONS WITHIN THE STATUTORY TIME LIMITS INFRINGES UPON THE AUTHORITY OF THE STATES, LEAVES THE REGULATED COMMUNITY IN LIMBO, AND DEPRIVES THE PUBLIC OF AN OPPORTUNITY TO PARTICIPATE IN THE PROCESS

Businesses have relied in good faith upon the primary authority of the States to grant relief from SIP requirements. Consistent with State law, they have operated their facilities in accordance with the DCOs or SIP revisions, even before a final EPA decision has been made upon the state-granted relief. However, it may take years, if ever, to obtain a final EPA decision on SIP revisions or DCOs. It often appears as if the EPA is a "black hole" for the submission of SIP revisions and DCOs.[6] EPA has initiated considerable litigation, including the case at bench, against these good faith attempts to comply with the mandates of state government while awaiting EPA decisions.

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[6] A "black hole" is a dense, stellar body from which no light emerges.

If EPA can take forever, and still keep the source in jeopardy of penalties for the entire, unpredictable period, all certainty and fairness of the Congressionally crafted DCO-SIP revision process are destroyed. The regulated source is stymied in its effort to know what the law expects of it. The State's primary role under the Clean Air Act becomes a charade. Whether by virtue of being an overworked bureaucracy or an overzealous claimant of the prerogatives of prosecutorial discretion, the EPA in this posture asserts its power as an obstacle to the State's implementation and enforcement of the Act.

A. THE AUTHORITY OF THE STATES IS USURPED BY THE EPA'S FAILURE TO ACT WITHIN THE STATUTORILY DEFINED TIME LIMIT.

Providing for both SIP revisions and DCOs to be issued by the States, Congress required they be approved by the Administrator expeditiously: 120 days for a SIP revision; 90 days for a DCO. 42 U.S.C. §§ 7410(a)(2), (a)(3)(A) and (g)(1), 7413(d)(2). Unless EPA honors these time limits, the States are effectively prevented from real-time response to changing economic, technological, or pollution circumstances. While considerable state resources may be expended in seeking accommodation to changing circumstances through negotiation and preparation of SIP revisions and DCOs, the conduct of public hearings thereon, and their submission to EPA, these efforts are rendered useless if EPA fails to act as mandated.

A central aspect of the allocation of power in the Clean Air Act is the pivotal role of the States in implementing and enforcing the Act's pollution standards. As this Court recently confirmed in *Hallstrom v. Tillamook County*, ___U.S. ___, 110 S.Ct. 304 (1989), a private citizen cannot initiate an enforcement suit under federal environmental statutes such as the Resource Conservation and Recovery Act ("RCRA") or the Clean Air Act until, after proper statutory notice, government prosecutors have had an opportunity to act first against the alleged violator. Citizen enforcement, in short, is supplementary or secondary to government enforcement. The present

case requires a similar but further refinement: federal enforcement under the Clean Air Act is secondary to state enforcement.

> The Agency [EPA] is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a *secondary* role in the process of determining and *enforcing* the specific source-by-source emission limitations which are necessary if the national standards it has set are to be met.

Train, 421 U.S. at 79 [Emphases added].

As a private suit cannot be brought until the government, including the State, has had a full opportunity to give effect to its choice of enforcement approach, so too the federal government should be prevented from prosecuting an enforcement case until the State has had a full opportunity to give effect to its choice of enforcement approach. This Court gave full effect to the RCRA statutory scheme in *Hallstrom*. So too should the Court give full effect to the Clean Air Act's assignment of power to the States in the first instance by eliminating federal enforcement powers until the State's preferred scheme for regulation of the source has been accorded the definitive treatment by EPA prescribed by the Act. In this case, as in *Hallstrom*, the proper approach should be a strict one: the enforcement plaintiff assigned a secondary role under the statutory scheme (*i.e.*, the private citizen in *Hallstrom* and the federal government in this case) cannot proceed unless and until the entity assigned the primary enforcement role (*i.e.*, the State under the Clean Air Act) has been provided the statutorily envisioned opportunity for its enforcement strategy to take effect.

EPA's failure to determine the approvability of SIP revisions and DCOs within the allotted time actually constitutes a "pocket veto" of the States' proposals. It impairs the ability of the States to achieve the National Ambient Air Quality Standards by the means they determine are preferable and practical. It deprives the States of the opportunity to timely explore alternative methods of regulation. It also creates a

vast national reservoir of businesses at risk of prosecution for non-compliance with "old" SIP provisions while complying with the States' "new" SIP provisions.[7] The reported cases are but the tip of the iceberg as to the number of sources at risk. Should this Court condone EPA's conscious disregard of its statutory deadlines, EPA would thereby be encouraged to bring even more enforcement actions against sources complying, in good faith, with State directives.

B. THE REGULATED COMMUNITY IS PLACED IN COMPLIANCE LIMBO.

The failure of the EPA to adhere to statutorily mandated deadlines for approval or disapproval of SIP revisions not only intrudes upon the primary role of the States, but also places members of the regulated community in compliance limbo.[8] The procedure urged by the EPA, in this web of

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[7] It may be in the economic interest of certain divisions within EPA to maintain a pool of technically non-complying businesses. For instance, in EPA Region IX, the resources allotted to the Compliance Section and the Regional Counsel's Office are in proportion to the number of cases referred for prosecution. That is, they have an annual minimum number of cases which they are required to initiate in order to maintain their personnel, travel and training funds. *See* Declaration of Allan Zabel, EPA Region IX Assistant Regional Counsel (Oct. 29, 1987), at ¶¶5 and 6 filed in *United States v. Mobil Oil Corporation*, pending in U.S. District Court, Eastern District of California, Case #87-0627 LKK.

[8] In *The Divine Comedy*, Dante asked his guide upon approaching the First Circle – Limbo, why the souls within that ring were tormented. The response seems an apt description of those awaiting EPA action on SIP revisions and DCOs.

> They sinned not; yet their merit lacked its chiefest
> Fulfillment, lacking baptism, which is
> The gateway to the faith which thou believest;
>
> Or, living before Christendom, their knees
> Paid not aright those attributes that belong
> To God; and I myself am one of these.

(Continued on following page)

litigation involving EPA power during the period a DCO or SIP revision is being "considered", leaves members of the regulated community confronted with a brutal choice: (1) shut down operations in order to cease "offending" air emissions until EPA renders a decision, however long that may take; (2) comply with the state-approved plan but operate in violation of the existing SIP; (3) attempt to comply with the existing SIP but violate the state-approved plan; or (4) initiate a suit seeking to mandate EPA action.

None of these four alternatives makes sense. Given that EPA's failure to act on State SIP revisions may exceed ten years, as noted in *Bethlehem Steel v. Gorsuch*, 742 F.2d at 1035, the first alternative, shutting down a facility to await action by the EPA, would likely constitute economic suicide for a business.

The second response, operation in compliance with a State's "new" SIP revision and in violation of the "old" federally-approved SIP provision, is no more attractive given EPA's enforcement posture as demonstrated in the cases, including that at bench. The current civil penalty for violation of a SIP is up to $25,000 per day, and criminal penalties may also be sought. A business operating under these circumstances is in an awkward position and is acutely vulnerable. It usually has gone to the state regulatory authority and *admitted* it is not in compliance or cannot come into compliance with the existing SIP provision. It has either requested a change in the SIP or a delay in compliance with the SIP. If the State grants relief, after the required notice and public hearing, the source then must publicly embark on a program to adhere to the terms of the state-granted relief. Thereafter, the State provides EPA with notice of this situation when it seeks approval of the SIP revision or DCO. Hence, a source

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(Continued from previous page)

For such defects alone – no other wrong –
We are lost; yet only by this grief offended:
That, without hope, we ever live, and long.

Dante, *The Divine Comedy: Hell*, Canto IV at lines 34-42.

honestly seeking relief has of necessity placed itself in a position of peril.[9]

As suggested by the factual context of the case at bench, if a source chooses the second alternative and ignores the old SIP requirements and acts to meet the mandate of a new SIP revision or DCO, it faces the specter of massive civil penalties or the possibility of criminal prosecution if the SIP revision or DCO is eventually disapproved. In the case of General Motors, however, EPA did not even wait to disapprove the proposed SIP before seeking penalties.

The third alternative set out above is no more reasonable. Initially, it must be noted that if the source could readily comply with the old SIP requirement, it would not be seeking relief. Hence, this "alternative" may be illusory. But even if it were possible to comply with the existing SIP while awaiting EPA's determination on the relief granted by the State, the source would most likely subject itself to penalties for violation of state law. When a SIP revision or a DCO is approved by the State, it becomes enforceable under state law. A source failing to comply with its terms could, therefore, be prosecuted. Indeed, this circumstance is encouraged by the EPA. It has urged the States to prosecute sources for non-compliance with the terms of DCOs during the period when EPA approval is pending.[10]

If the source complies with the old SIP, assuming it can do so, and ignores the requirements of the SIP revision or

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[9] EPA's approach may actually create disincentives to honor the regulatory scheme. A source may be tempted to engage in "self-help", deliberately ignoring the statutory scheme for obtaining relief, so as to be at less risk of prosecution than a source calling attention to itself by seeking a SIP revision or a DCO.

[10] *See* Memorandum from Marvin Durning, Assistant Administrator for Enforcement, to Regional Administrators and Regional Enforcement Directors, "Enforcement Under Clean Air Act Amendments – Orders under Section 113(a) and 113(b)", July 27, 1978, at p.10, *reprinted in* Government Institutes, Inc., EPA Clean Air Act Compliance/Enforcement Guidance Manual, at 428 (1985). This memorandum was addressed on this point in *General Motors v. EPA*, 871 F.2d at 501.

DCO, not only is it subject to prosecution by the State for noncompliance with the new SIP, but if the SIP revision or DCO is later approved by the Administrator, the source can find itself immediately in retroactive violation of the SIP revision which likely required completion of some act at a prior time.

The final alternative, initiation of an action seeking mandate of a decision upon the state-generated relief, is also ineffective. It was the Second Circuit's recommended response to the Administrator's tardy review of a New York SIP revision proposal. *CCO v. Thomas*, 799 F.2d at 888. Such action would necessarily be initiated under 42 U.S.C. § 7604(a)(2). This section provides an action may be brought against the Administrator where he has failed to perform a non-discretionary duty. At the outset, it must be noted the action may not be commenced until the Administrator has been afforded 60 days' notice of his alleged dereliction of duty. This notice, in turn, cannot be provided until the statutory period within which he may act (i.e., 90 days for a DCO or 120 days for a SIP revision) has run. Then and only then may an action be initiated. Thus, by the time suit may be filed, a source is already "at risk" at least 50% longer than mandated by Congress.[11]

Thus, the practical consequences of EPA procrastination are significant no matter which strategy a source adopts. A

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[11] The pace and vagaries of litigation can only further extend this period of risk. Of particular note, as referenced in the recent Sixth Circuit decision, an action under § 7604(a)(2) was initiated by the Jefferson County (Kentucky) Air Pollution Control District in an attempt to force a timely decision on a SIP revision proposal. The source which was the subject of the proposed revision nevertheless became the subject of an EPA enforcement action. The court in that case observed, "[t]he alternative remedy of suit under Section 304(a) [42 U.S.C. § 7604(a)] to compel EPA to rule is not very effective. . . . The final ruling on the proposed revision came well over two years after the section 304(a) suit was filed." *United States v. Alcan Foil Products*, 889 F.2d at ___. The ineffectiveness of such a suit as a safeguard to EPA inaction was also noted by the D.C. Circuit. *Duquesne Light*, 698 F.2d at 472.

source may choose economic ruination or alternatively may risk the possibility of substantial civil or criminal penalties either at the hands of the federal government if it abides by the State's new SIP requirements, or at the hands of the State if it ignores the new State requirements and adheres to the old SIP. Certainly Congress did not intend to create such a quandary. Clearly the question of constitutional guarantees of due process and equal protection is raised by such a dilemma.

In crafting the provisions of the Clean Air Act, Congress recognized there would be time required to accommodate the federal government's review of a proposed SIP revision or DCO. For this reason, the authors of the Act provided 90 or 120 days for the Administrator to conduct his review and issue his decision. This short time frame was allotted for the Administrator's decision-making process so as to place a finite limit on a source's exposure to fines or penalties during the Administrator's review.

Admittedly, regulated sources are inescapably in a delicate position for these brief statutory periods, operating in jeopardy of enforcement penalties from one level of government or the other. But the limited time period of such jeopardy chosen by Congress can be dealt with, as a practical matter, by both the source and the State authorities. Both can know that the approval or disapproval from the federal government will be forthcoming by a date certain. Private investment and pollution control planning, and state government enforcement initiatives, can proceed on sensible, predictable schedules. Absent such a limitation on exposure to penalties, sources are in the dark, not knowing for certain, possibly for years, what is required by way of compliance.

Delay in rendering a decision will often place a source in the position of being unable to avoid penalties. The instant case is a clear example of such a situation. The Agency's disapproval decision on Massachusetts' proposed SIP revision was not finalized until two years and nine months after it was submitted to EPA by the Commonwealth. Since General Motors' act of compliance with the new, revised SIP (and in

contravention of the old SIP) was by then complete, there was no way General Motors could change its operations to avoid the attempted imposition of penalties.

C. MEMBERS OF THE PUBLIC ARE DEPRIVED OF THEIR ABILITY TO PARTICIPATE IN THE PROCESS.

The Clean Air Act, in addition to providing for a federal-state partnership in air pollution control, mandates that substantial participation by the citizens of the country be possible. Congressional desire for public participation is manifest in the sections of the Act dealing both with SIPs and with DCOs.[12] An action to challenge the Administrator's approval must be initiated in the appropriate U.S. Circuit Court of Appeals within 60 days of publication.[13] 42 U.S.C. § 7607(b)(1).

The Act's invitation to the public to participate in the process is effectively withdrawn by Agency inaction. The case at bench is a clear example. There is no suggestion that the Commonwealth shirked its duty to provide notice and public hearing on the proposed revision. Presumably, resultant public comment was considered by Massachusetts prior to its determination to revise the SIP. The Administrator's final decision on the Commonwealth's proposed SIP revision did not occur until after the facility which was the subject of that proposal had ceased operation. If the Administrator had approved the revision, it would have been too late for any citizen to challenge that result.

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[12] *E.g.*, § 7410(a)(1) provides for original state SIP submissions "[a]fter reasonable notice and public hearings"; § 7410(a)(3)(A), dealing with state SIP revisions, incorporates "reasonable notice and public hearings"; and § 7413(d)(1)(A) provides for public notice and opportunity for public hearing prior to a state's adoption of a DCO. Additionally, the EPA's consideration of SIP revisions or DCOs is published in the Federal Register for public comment.

[13] An action to challenge the disapproval of a DCO may also be possible under the authority of § 7607(b)(1). *Bethlehem Steel v. Gorsuch*, 742 F.2d at 1032.

III.

ONLY THE CASE LAW IN THE FIFTH CIRCUIT IS CONSISTENT WITH THE STATUTORY SCHEME OF THE ACT

The Circuit Courts of Appeals which have articulated responses to EPA's avoidance of its statutory mandate to timely act upon proposed SIP revisions and DCOs have provided a variety of approaches. The Seventh Circuit first commented on the failure of EPA to comply with time deadlines in the Act. In *Bethlehem Steel Corporation v. United States Environmental Protection Agency*, 638 F.2d 994 (7th Cir. 1980), the court considered the EPA's failure to determine the approvability of a DCO within the 90 day period prescribed by § 7413(d)(2). Woven into the facts of the case were allegations that EPA personnel improperly commingled adjudicative and prosecutorial functions and arrived at their decision to disapprove the DCO in order to enhance EPA's prosecutorial position in an ongoing enforcement action.

The *Bethlehem* court chastised EPA for its failure to adhere to the mandate to decide DCOs within 90 days of their submittal. The court dismissed EPA's claim that it had an indefinite time to reach a final determination on a DCO so long as *some* "predisposition" was issued within 90 days. In a footnote, the court stated its belief that the filing of a civil enforcement action prior to the issuance of a disapproval of the DCO "[w]ould open up many questions concerning the continued viability of the action. . . ." *Bethlehem Steel*, 638 F.2d at 1002-1003 n. 9.

In the wake of *Bethlehem Steel*, the Second Circuit was called upon in a pair of related cases to review SIP revisions for the New York City area. *See CCO v. Gorsuch*, 683 F.2d 648; *CCO v. Thomas*, 799 F.2d 879. In both cases, EPA failed to act upon proposed SIP revisions within the four months allotted.

Despite being taken to task by the court in *CCO v. Gorsuch*, 683 F.2d at 661 for its delay, when it came time to review a subsequent proposed SIP revision by New York, EPA again took approximately three years to reach a decision. In

CCO v. Thomas, the court reiterated its concern that the EPA was not honoring its time-sensitive, statutory mandate. As a remedy for EPA's delay, the Court recommended "[a]n enforcement action [against EPA] in district court under section 7604(a)(2)." *CCO v. Thomas*, 799 F.2d at 888. As discussed above, this is not a realistic solution.

In *Duquesne Light v. EPA*, 698 F.2d 456, the D.C. Circuit was petitioned by over a dozen entities to review final EPA regulations dealing with non-compliance penalties provided for by section 120 of the Act (42 U.S.C. § 7420). Petitioners objected to an EPA regulation (40 C.F.R. § 66.3(c)(1)) which allows penalty assessments against a major source in violation of existing SIP requirements, despite the pendency of a proposed SIP revision before the EPA for approval. The D.C. Circuit's solution to this quandary was to suggest that once the statutory deadline for acting on a SIP revision passes, the non-compliance penalty should be held in abeyance until EPA's final action on the SIP. "Should EPA ultimately reject the SIP, the penalty should be calculated back to the deadline, with interest." *Duquesne Light*, 698 F.2d at 472.[14] The court then remanded EPA's regulation (40 C.F.R. § 66.3(c)(1)) back to the Agency and directed that a new regulation be developed which incorporated the court's determination. A review of 40 C.F.R. § 66.3 indicates that, to date, the EPA has still not reissued the regulation, as directed by the Circuit Court.

A. THE RULE IN THE FIFTH CIRCUIT IS CONSISTENT WITH LEGISLATIVE INTENT.

Because the statutory framework requires EPA to approve SIP revisions or DCOs before they can become part of the federally-enforceable SIP, there is necessarily a lag in time between a State's adoption of a revision and EPA's review and approval of it. It is also apparent that during this period of federal review, a source is often unable to comply

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[14] The Court also observed that the initiation of an action under § 7604(a)(2), as suggested by the Second Circuit in *CCO v. Thomas*, 799 F.2d at 888, does not safeguard the rights of the source.

with both the existing SIP requirements and the new obligations adopted by the State but not yet approved by EPA.

American Cyanamid was confronted by such a dilemma when it was under an obligation to install air pollution control equipment on "floating roof" tanks in order to comply with the "old" SIP but had the opportunity to achieve the same quantitative emission reductions under a revision to the SIP. In the Fifth Circuit case of *American Cyanamid v. EPA*, 810 F.2d 493, EPA was requested by the State of Louisiana, pursuant to § 7410 of the Act, to approve revision of the SIP to reflect this change in the State's regulatory strategy. Over two years later, EPA sent American Cyanamid, the source subject to the SIP revision, a Notice of Non-compliance under § 7420 of the Act. At the time the Notice was sent, indeed even two years later at the time of the court's ruling, EPA had not acted on the Louisiana SIP revision. The court determined that when a proposed SIP revision has been pending for more than four months, EPA may collect penalties only for violations which occur after the EPA finally rejects the proposed SIP revision. *Id.* at 500. While the *American Cyanamid* case was brought under § 7420 of the Act, instead of under § 7413 as in the present case, the court's reasoning is fully applicable in both contexts, as the Fifth Circuit later declared.

The Fifth Circuit recently reviewed the circumstances of EPA's failure to act upon a DCO within the 90 days provided by statute. In *General Motors v. EPA*, 871 F.2d 495, the State of Texas issued a DCO to General Motors and submitted it to EPA for approval. Prior to acting to approve or disapprove the DCO and after it had expired by its own terms, EPA issued a Notice of Violation to General Motors. The Court reviewed the rationale underlying its decision in *American Cyanamid* and found that it was equally applicable in the *General Motors* case, remarking, "[t]he § 7413(d) deadline applicable to delayed compliance orders is no less important than the § 7410 deadline governing revision to state plans." *General Motors v. EPA*, 871 F.2d at 498. Consistent with the holding in *American Cyanamid*, the Fifth Circuit held EPA must forfeit its power to collect penalties between the end of the 90-day

period for EPA action and the expiration date of the DCO if EPA had still not acted when the DCO expired.

The rule in the Fifth Circuit effectuates Congressional intent. It provides incentives for EPA to act within the allotted time by eliminating EPA's ability to seek penalties from a source until EPA acts to approve or disapprove the revision. It limits the period of time during which a source is uncertain as to appropriate conduct. It deters needless litigation and its concomitant expense to sources and the taxpayers.

Even the Fifth Circuit's rule does not entirely eliminate the harsh problems confronting sources as a result of EPA delay. A source is still subject to penalties after the EPA's ultimate decision, and the source risks that even slavish compliance with the terms of a proposed SIP revision or DCO may ultimately result in non-compliance with the State's SIP if EPA eventually disapproves. For example, a State may adopt a SIP revision calling for installation of a particular type of control by a date certain, *e.g.*, two years hence, with increments of progress to be met along the way. A subject source may thereafter expend millions of dollars installing appropriate air pollution control technology, in full compliance with the defined progress milestones, successfully achieving compliance by the date certain. Then, perhaps months later, the source may again become at risk if EPA disapproves the proposed revision because the source is not in compliance with the existing SIP. While the Fifth Circuit rule has these burdensome shortcomings, it is the one which most closely effectuates Congressional intent. Clearly, the EPA's timely fulfillment of its responsibilities best adheres to that intent and its underlying rationale.

B. THE RULES IN THE D.C., FIRST AND SIXTH CIRCUITS ARE BASED UPON ERRONEOUS ASSUMPTIONS.

The final line of cases dealing with the failure of EPA to timely fulfill its obligations includes the First Circuit's *General Motors* case at bench and the Sixth Circuit's decision in *United States v. Alcan Foil Products*, 889 F.2d 1513, relying upon the First Circuit's view. In *U.S. v. General Motors*, 876

F.2d 1060, the First Circuit addressed the consequences resulting from EPA's failure to honor its statutory obligation. The court adopted a rule which places responsibility upon the trial court to take the Agency's delay and any resultant prejudice to the source into consideration when determining the appropriate amount of penalties to assess. The court indicated a belief that this possible reduction in penalties would provide EPA sufficient incentive to timely act.[15]

Finally, the Sixth Circuit's decision in *Alcan Foil Products* reviewed the D.C., Fifth and First Circuit approaches. Observing that "the public should not suffer because of EPA's failures," the Sixth Circuit adopted the First Circuit's rule that the amount of civil penalties in an enforcement action may be adjusted to take into account any prejudice to the source caused by EPA delay.[16] *United States v. Alcan Foil Products*, 889 F.2d ___.

The *Duquesne Light* and *General Motors* lines of decisions are predicated on erroneous assumptions. Each case expresses the concern that the "public not be injured" through impediment to EPA enforcement of an old SIP provision while a revision is pending.[17] While concern for the public

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[15] It seems unworthy, almost venial, that incentives for prompt EPA action on SIP submissions should relate so overwhelmingly to the quantity of penalties EPA can collect. Congressional mandates and the broader policy impacts of delay are more appropriate incentives.

[16] As with the D.C. Circuit in *Duquesne Light*, the First Circuit and the Sixth Circuit failed to take into account the States' primary responsibility for enforcement, as well as the fact SIP revisions are enforceable under State Law even before approval by the EPA.

[17] These concerns are apparently not shared by the EPA. In a memorandum to Regional Air Management Directors, Sheldon Meyers, Director of EPA's Office of Air Quality Planning and Standards, suggested the States be discouraged from submitting a SIP revision where the delay sought to be accomplished by the revision will be less than the time required for EPA to process the State's proposal. Since it often takes three or more years for EPA to issue a decision, presumably EPA is not interested in seeing SIP revisions, such as that issued to GM in the case at bench, where the pollution ceases before EPA acts upon the proposal. *See* "Source Specific SIP Revisions", July 29, 1983, *reprinted in* EPA Clean Air Act Compliance/Enforcement Guidance Manual, *supra* at 223-24.

welfare is always appropriate, the opinions have ignored the legitimate expectations of the regulated community that EPA will comply with the terms of the Act and deal fairly with the regulated community and the States. The opinions of the courts in these cases also expose a serious flaw in analysis: the assumption that regulated sources will be uncontrolled or unregulated if EPA is precluded from enforcing the existing SIP.

As is apparent from the language of the Act itself, as well as decisions of this Court interpreting the Act, the States have *primary* responsibility for development and enforcement of the regulations comprising the SIPs. The EPA's enforcement role is *secondary*. *Train*, 421 U.S. at 78-79. Once a State adopts a SIP revision, it has the ability to enforce that regulation under State law, even absent approval of the EPA. In view of this and the State's primary responsibility for air pollution control, the public faces no risk because there would be no unregulated sources of air pollution even during EPA's extended review.

Perhaps even more distressing than the EPA's jaundiced view is its apparent acceptance in at least some of the recent judicial opinions addressing the issue. For example, in the First Circuit's decision in the case at bench, the Court characterizes the states' motivation in these circumstances as "the states' interests in protecting its [sic] local industry." 876 F.2d at 1067. The Court further characterizes the "states' interests" as being in opposition to "the public's." *Id.* at 1068. That characterization is particularly ironic given the success of Massachusetts in bringing GM's facility into an environmentally superior operation.

The pejorative and oversimplified view inherent in such a statement wholly disregards the tremendous labors exerted by the States, as well as regional and local government units, to advance the cause of environmental protection. If the States give some consideration to the economic welfare of their citizens and businesses, while trying to achieve environmental goals, that is their right and duty, as this Court firmly recognized in the *Train* and *Union Electric* decisions. But to

recognize the States' power to balance these competing interests is not to reduce them to the level of apologists for pollution. Certainly the thousands of individuals and regulated sources daily striving to comply with state law environmental requirements, and to cope with the strong enforcement tools of the states – including monetary penalties, judicial injunctions, administrative variance and abatement orders, and even criminal sanctions including imprisonment, would not agree with the characterization suggested by the First Circuit.

Underlying this judicial depreciation of the role and motives of the States is an apparent misconception of the enforceability of State environmental law. It should be clear, but apparently it is not, that SIP provisions adopted by a State are in force and enforceable under State law, regardless of whether they are approved by the EPA. "Perhaps the most important thing to recognize about state environmental law is its independence of federal authority. . . .[S]tate environmental law is not simply a vestige operating with respect to federal environmental law. Nor does state law operate solely to 'fill in the blanks' set out in federal law. Rather, state law ordinarily sets out a full program of regulation that may include not only those elements needed for federal 'authorization', but also numerous additional elements. . . ." Novick *et al.*, *Law of Environmental Protection*, § 6.01 at 6-3, 6-4 (1987). The concurring opinion in *Alcan Foil Products* plainly does not understand this, as it refers to a "proposed revised SIP" as having "no legal efficacy whatever." The lawyer who would advise his or her client that a new regulation, DCO, or variance adopted by state air pollution authorities has "no legal efficacy whatever" would be risking serious malpractice liability.

California law is illustrative on this point. The California Legislature delegated primary authority for developing components of the SIP to the local air pollution control districts ("APCDs") within the State. Cal. Health & Safety Code § 41650(a). The APCDs are to adopt rules and regulations to execute their powers and duties. Cal. Health & Safety Code § 40702. Determination of the APCDs as to the proper air

pollution control measures within their individual jurisdictions is conclusive unless the State Air Resources Board ("ARB") determines otherwise after a public hearing. Cal. Health & Safety Code §§ 41650-41652. The ARB is the air pollution control agency for all purposes set forth in federal law. Cal. Health & Safety Code § 39602. The ARB has the responsibility for SIP submissions to EPA. 42 U.S.C. § 7407(a).

The violation of the rules and regulations of an APCD may be punished either criminally (Cal. Health & Safety Code § 42400) or by civil penalties of up to $25,000 per day (Cal. Health & Safety Code §§ 42400.1-42403). Obviously, a source faces substantial state law sanctions for failing to adhere to the requirements of local rules and regulations, whether or not EPA has yet acted to approve them as part of the SIP.

Also overlooked is the encouragement of litigation, and the resultant additional burdens upon the federal courts, if the approaches of the D.C., First, Second, or Sixth Circuits are the adopted norm. Plainly, it makes little sense to condone initiation of enforcement litigation against sources attempting to comply with new State regulations while an EPA decision upon proposed revisions is overdue. If EPA is permitted to initiate such actions, it has no incentive to issue a final determination upon pending State revisions until after the enforcement action is concluded, if then. EPA is able to usurp the States' primary role solely by ignoring its own mandate to act. Similarly, the cases demonstrate that the initiation of an action against the Administrator under § 7604 fails to incite timely conduct on the part of EPA. This merely creates another pointless item of litigation in the federal courts without providing any guidance to the regulated community as to appropriate conduct.

The First Circuit approach also tends to rewrite the Act. The court is effectively saying that the failure to meet the statutory deadline only matters if "prejudice" can be shown to the source, but not otherwise. This is a dangerous approach to enforcement of statutory deadlines, reading an escape clause

where Congress has not seen fit to provide one. While "prejudice" may not be demonstrable to an individual source, the State's whole regulatory approach may be harmed by EPA delay, yet the First Circuit rule fails to take this into account.

Finally, "adjustment" of penalties, in order to take into account the "prejudice" suffered by a source due to EPA inaction, is an illusory sanction. A "penalty adjustment" obviously does not prohibit the initiation of an enforcement action. In fact, § 7413(b) *requires* the initiation of an action against the operator of a major source where the source remains "in violation" of a SIP thirty days after being provided a Notice of Violation as provided by § 7413(a)(1). An action may be initiated against the operator of a minor source under these same circumstances. Thus, the mere issuance of a Notice of Violation of an old SIP requirement, during the pendency of a SIP revision, has significant consequences. Sources are pushed down the slippery slope, inexorably becoming subject to the not inconsiderable expense of litigating an enforcement action with the federal government. Even assuming that at the conclusion of such litigation a court determined the prejudice suffered by a source from EPA's delay was so great as to negate any award of civil penalties, the source would necessarily have incurred substantial defense costs and even public obloquy.

Settlement of civil penalties actions under these circumstances will likely be more complex and difficult than ever. The EPA has published a civil penalty policy which provides the strictures within which EPA and Justice Department personnel must operate in settlement discussions. The EPA has a similar policy for calculation of § 120 noncompliance penalties.[18] These policies drastically limit the flexibility of the

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[18] *See, e.g.*, "Clean Air Act Stationary Source Civil Penalty Policy," September 12, 1984, and "Settlement of Noncompliance Penalties Under Section 120 of The Clean Air Act," October 30, 1980, and April 2, 1981, *reprinted in* – EPA Clean Air Act Compliance/Enforcement Guidance Manual, *supra* at 537-594, 639-641, 656-62. The application of these

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government to negotiate settlement dollar amounts in enforcement actions initiated under §§ 7413 and 7420 of the Act.

1. The approach of the First and Sixth Circuits ignores the practicalities of air pollution control compliance under the Congressional scheme.

Consistent with the primary role of the States and local government in control of air pollution, the day to day regulation of sources is performed by State and local authorities. A source's understanding of its obligations and timetables for compliance is largely, if not entirely, derived from those authorities. Contact with EPA officials is rare; EPA's activities under the Act are almost always in the background. This is all entirely consistent with the intent of Congress and the statutory scheme of the Act. "[T]he majority of lawyers working on environmental problems – either on a regular or an occasional basis – deal in most instances with state law and local regulations, rather than with federal law and agencies. In part this is because the underlying federal statutes are largely implemented at the state level. . . ." Selmi and Manaster, *supra*, §1.01 at 1-1.

Day in and day out, air pollution sources – private individuals, small businesses, large corporations, municipalities, even the federal Government's own installations which pollute – are trying to comply with the air pollution requirements

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penalty policies is so restricting that once an action is initiated, the government cannot dismiss the action without the defendant's payment of the minimum amount determined by performing the penalty calculation. Hence, even if a source could ultimately convince EPA personnel of extreme prejudice, the penalty policy does not permit the action to be dismissed without payment. The addition of a new "prejudice" factor into this penalty policy settlement mix will only further inhibit the ability of prosecutor and defendant to come to a meeting of the minds as to a settlement. Even if some resolution could be reached, the amount of government effort expended could well exceed the effort that would have been required to reach a timely decision on a SIP proposal in the first place.

of the States. Members of the public, as individuals and in organized environmental groups, regularly testify, lobby, petition, and otherwise participate in the regulatory efforts of state-level environmental agencies. Certainly the public is served by these regulatory efforts. It is myopic in the extreme – looking hardly beyond the banks of the Potomac – to believe that the States' interests do not serve the public and do not serve environmental protection. Such a perspective does not correspond with reality. Nor does it correspond with the allocation of power Congress embodied in the Clean Air Act.

2. The practical results of the approaches taken by the various Circuits can be clearly contrasted.

As this graphic comparison demonstrates, only the Fifth Circuit rule provides an approach which is consistent with statutory intent.

	Fifth Circuit	DC Circuit	First & Sixth Circuits
1.	Exposure to penalties only during statutory review period and if review takes longer, exposed to penalties only after EPA decides.	Exposure to penalties for the entire period EPA takes to review SIP proposal.	Exposure to penalties for the entire period EPA takes to review SIP proposal but allows mitigation based upon "prejudice" to source.
2.	Provides high degree of incentive for EPA to timely decide.	Provides no incentive for EPA to timely decide.	Provides limited incentive for EPA to timely decide.
3.	Reduces incentive for initiation of actions before EPA decides on SIP revision.	Enhances likelihood of initiation of EPA actions even before EPA decides on SIP revision.	Enhances likelihood of initiation of EPA actions even before EPA decides on SIP revision.

4.	Assumes states have primary SIP enforcement responsibility.	Assumes federal government has primary SIP enforcement responsibility.	Assumes federal government has primary SIP enforcement responsibility.
5.	Provides disincentive for EPA to attempt "pocket veto" of state regulation.	Allows EPA a "pocket veto" of state regulation.	Allows EPA a "pocket veto" of state regulation.

IV.

CONCLUSION

The arguments in this case, and the pertinent decisions of the Circuit Courts of Appeals, present competing interpretations of rather technical provisions of the Clean Air Act. The discourse tends to become highly legalistic in nature, focusing upon the terms of the Act as a discrete object of study. But this case is neither an academic exercise nor a theoretical exploration of the concept of federalism. This case reflects the tremendous practical difficulties the Nation faces in cleaning up the air we breathe, while at the same time preserving the fundamental fairness of our legal system, the day-to-day integrity of a system of shared federal-state governmental power, and the ability of individuals and companies to engage in business for the economic health and welfare of the Nation without unpredictable regulatory obstacles and even retroactive penalties being cast in their way.

Petitioner and *amici* have tried to illuminate the need for this Court to firmly enforce the statutory deadlines Congress established in the Clean Air Act. In a broad sense it is only fair that the federal Government be required to abide by the deadlines Congress has imposed under the Act, just as must the States and just as must business entities regulated under both that Act and state environmental legislation. It is difficult to imagine the coherent operation of a legal system which accepts the rationalizations offered by EPA for the pattern of delay at issue here. Obviously deadlines and procedural niceties are not always convenient. In the *Hallstrom* decision,

this Court rightly insisted upon enforcing Congressionally chosen procedural prerequisites. The Court did not disregard the statutory prerequisite to initiation of an action simply because the citizen's zeal to litigate in the interest of environmental protection would arguably promote the public good. Similarly, EPA's zeal to initiate enforcement litigation does not justify judicial disregard of the procedural deadlines Congress has written into the Act.

These statutory deadlines are not just optional frills and extras included by the Legislative Branch to make sure federal bureaucrats keep busy. They reflect the real sharing of power and responsibilities between the States and the federal Government which Congress built into the Act. The Act can only operate fairly, effectively, and efficiently if *all* participants – the States, the federal Government, regulated sources, and citizens – are required to play by the defined rules. Ironically, the EPA's position in this case is an attempt to rationalize for itself a broad disregard for the timetables imposed by Congress upon the federal Government itself and to claim the unbridled right to enjoy unlimited delay in reviewing the States' allowances of specific, time-limited delays for regulated businesses. EPA'S overriding concern appears to be maintenance of total freedom to seek monetary penalties at any time, even from sources whose compliance problems are solved and who are covered by pending and unanswered SIP revisions.

It is obviously most desirable for the Court to resolve a dispute of this sort on the basis of clear statutory language. But as all parties appear to agree, this is a case in which Congress has not spoken clearly on the appropriate remedy for the EPA's failure to adhere to the statutory deadlines. It thus falls to the Court to implement the remedy which best corresponds with the language, structure, and purposes of the Act.

Amici have shown it is the Fifth Circuit position which comports most closely with the Act and which will most fairly and effectively honor the Congressionally prescribed rights and needs of all participants in the statutory process. If EPA is prevented from seeking penalties during the period of its

extra-statutory delay, the States will have the fullest opportunities to effect and enforce their chosen and evolving mix of control strategies. Regulated sources and members of the public will know with much greater certainty just what compliance conduct is required at any given time. The EPA will retain the right to issue its decisions whenever it wishes and thereafter to pursue prospectively any appropriate penalties for continuing violations.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF AMICUS CURIAE
SERVICE STATION DEALERS OF AMERICA

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January 18, 1990

No. 89-369

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TABLE OF CONTENTS

Table of Authorities i

Interest of Amicus 1

Summary of Argument 4

Argument 5

I. THE STATES HAVE PRIMARY AUTHORITY FOR CONTROL OF AIR POLLUTION SOURCES WITHIN THEIR BOUNDARIES UNDER THE CLEAN AIR ACT 5

II. EPA MUST ACT ON A PROPOSED SIP REVISION WITHIN FOUR (4) MONTHS OF THE APPLICATION BY THE STATE 9

III. THE FIRST CIRCUIT'S PROPOSED REMEDY FOR EPA INACTION IS UNWORKABLE 13

A. The Citizen's Suit 14

B. Reductions In Potential Penalties Is Also Not An Appropriate Remedy For The Administrator's Inaction 17

IV. ONLY THE ENFORCEMENT BAR AS ADOPTED BY THE FIFTH CIRCUIT IN AMERICAN CYANAMID PROPERLY PRESERVES THE ROLE OF THE STATES AND IS FAITHFUL TO THE PURPOSES OF THE ACT 19

Conclusion 21

STATEMENT OF INTEREST

With the consent of the parties, the Service Station Dealers of America (hereinafter SSDA) respectfully submits this Brief Amicus Curiae in support of the Petitioner. The SSDA is the voice of America's sixty thousand (60,000) independent retail gasoline dealers. It consists of forty-three (43) State and regional dealer associations. The SSDA believes that its interests in the case have not been specifically represented by any of the parties nor their supporting amaci. Specifically, the SSDA brings the perspective of the small business group most affected by the Clean Air Act to this case. SSDA members typically own and/or operate a single service station, which is the sole means of supporting their families. For purposes of the Clean Air Act, they would be classified as non-major stationary sources. Both the

Petitioner, General Motors, as well as many of its supporting amici are major stationary sources and are large businesses which would have greater, but by no means adequate, resources to utilize the remedy suggested by the First Circuit for EPA's inaction on a proposed State SIP revision. Specifically, the SSDA is very concerned that the proposal that a small stationary source is some how adequately protected from EPA inaction by its ability to file a mandamus action in a District Court to compel the EPA administrator to act on a SIP revision. This remedy that simply does not grant any real world relief and if anything, for a small business could be classified as a phyrraic victory. The litigation costs alone would be too great for a small business to bear.

According to EPA's own data, the typical SSDA member firm has a medium net worth of

only Eighty-one Thousand and 00/100 ($81,000.00) Dollars. To suggest, as the First Circuit did, that dealers spend these limited resources pursuing actions to compel the EPA administrator to perform a duty which he or she clearly has to perform under the law is simply not facing reality. Indeed, we further question whether Congress ever intended that the limited resources of small business such as those represented as SSDA be spent on enforcement actions to compel the administrator to perform a non-discretionary duty, as opposed to investing in those control strategies that would most expeditiously produce attainment of the National Ambient Air Quality Standards in the many non-attainment areas across the country. Thus, while in a very broad sense the interest of the SSDA coincide with those of the Petitioner and some of its supporting

amici, the SSDA approaches the issues presented from a perspective not represented in the case and thus, has filed the following brief.

SSDA would add that many of its members run small auto body and paint shops affected by the regulations at issue in the case at bar.

SUMMARY OF ARGUMENT

1. The States have the primary responsibility for the control of air pollution sources within their boundaries under the Clean Air Act; allowing EPA to delay approval or disapproval of revisions to the State's plan beyond the four (4) month deadline, upsets the carefully crafted statutory provisions.

2. The plain language of the statute as well as its legislative history and the unanimous holdings of the Courts of Appeal to

consider it lead to the conclusion that the four (4) month deadline for EPA to approve or disapprove a State's SIP is equally applicable to proposed revisions to that SIP.

3. The First Circuit's proposed two-pronged remedy for EPA's failure to observe the four (4) month deadline is unworkable. First, the citizen's suit remedy would require a company to potentially expose itself to a fine of One Million Five Hundred Thousand and 00/100 ($1,500,000.00) Dollars, and in practice, litigation costs alone make this impractical for a small business such as those represented by SSDA.

The reduction of penalty remedy is something that is left solely at the discretion of the District Court and is not mandatory as are the statutory mitigating factors.

4. Only the enforcement bar rule, as adopted by the Fifth Circuit, gives full effect to Congressional purposes.

ARGUMENT

I. THE STATES HAVE PRIMARY AUTHORITY FOR CONTROL OF AIR POLLUTION SOURCES WITHIN THEIR BOUNDARIES UNDER THE CLEAN AIR ACT.

Of principal concern to the SSDA in the case is the position taken by EPA that it can withhold its approval of a proposed revision to a State implementation plan and thus, in effect, "pocket veto" such revisions, while at the same time seeking penalties against those corporations and sole proprietorships, that may act in good faith reliance on such proposed revisions.

When dealing with the regulation of stationary sources under the Clean Air Act,

it is not unfair to say that the States are the dog and the EPA is the tail.

The plain language of the Act makes clear that "each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State." 42 U.S.C. §7407(a) (emphasis added). Congress has repeatedly reaffirmed this primary role of the States in its periodic revisions of the Act.

For example, in the 1977 revisions to the Act, Congress enacted a method by which States could grant temporary relief from SIP requirements in the form of "delayed compliance orders", the authority for which is now found at 42 §7413(d). The legislative history of this provision states that it was enacted in large part in order to "reaffirm the primary role of the States in the formulation and enforcement of State

implementation plans." See, House Report No. 95-294, 95th Congress, First Session, (1977), re-printed in 1977 U.S. Code Congressional and Administrative News 1077, 1135-1136.

Thus, as this Court pointed out in Train v. Natural Resources Defense Council, 421 U.S 60 (1975):

> "The agency is plainly charged by the Act with the responsibility for setting National Ambient Air Standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source by source admission limitations which are necessary if the national standards that are set are to be met ... the Act gives the agency no authority to question the wisdom of a State's choice of admission limitations if they are part of a plan which satisfies the standards of §110(a)(2) ... so long as the ultimate effect of a State's choice of admission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of admission standards it deems best suited to its particular situation."

421 U.S. at 79 (1975).

Finally, it should be pointed out that if a SIP meets the check list of criteria set out in 42 U.S.C. §7410(a)(2), the administrator has no choice but to approve such SIP or a revision thereto.

Allowing EPA to procrastinate beyond the statutorily prescribed four (4) month deadline, as discussed in detail infra, subserviates the State's to EPA, and grants the Federal Government the primary role that the plain language of the Act leaves for the States.

For this policy reason alone, this Court should affirm the holding of the First Circuit that the four (4) month limitation applies to EPA review of SIP revisions, as well as to the original SIPs themselves.

II. EPA MUST ACT ON A PROPOSED SIP REVISION WITHIN FOUR (4) MONTHS OF THE APPLICATION BY THE STATE.

The threshold issue in this case, as framed by the First Circuit, is "whether the

Act imposes a four (4) month deadline on EPA review of SIP revisions." U.S. v. General Motors Corporation, 876 F.2d 1060, 1065 (1st Cir. 1989). The First Circuit correctly held that the four (4) month limitation does indeed apply to SIP revisions as well as the EPA review of original SIPs. Id. at 1066.

To begin with, Amicus believes that this interpretation is supported by the only reasonable interpretation of the plain language of the Act. Specifically, the Act requires that EPA either approve or disapprove of an original SIP submitted by a State within a hundred twenty (120) days of receipt by EPA of the SIP. 42 U.S.C. §7410(a)(2). Next, §7410(a)(3)(A) dealing with SIP revisions, expressly incorporates the requirements of §7410(a)(2).

Therefore, the First Circuit was clearly correct in following its sister circuits in

holding that the one hundred twenty (120) day deadline for EPA action on a SIP revision is incorporated into 42 U.S.C. §7410(a)(3)(A).

Moreover, 42 U.S.C. §7410(g)(1) discusses circumstances when the EPA administrator has not approved or disapproved the SIP revision within the "required four (4) month period". It should be noted that the First Circuit did not examine the plain implication of §7410(g)(1) in reaching its decision.

While Amicus believes that the Court need go no further than the plain language of the statue in order to affirm the holding of the First Circuit, it is important to note that in at least one Federal Register notice concerning regulations governing penalties for non-compliance pursuant to 42 U.S.C. §7420, EPA itself has acknowledged that the four (4) month limitation applies to SIP

revisions. See, 50 Federal Register 36,732 et. seq. at 36, 733 (September 9, 1985).

Finally, it is important to note that there is now unanimity within the circuits that the Clean Air Act imposes a four (4) month deadline on EPA review of proposed SIP revisions. See Council of Commuter Organizations v. Gorsuch, 683 F.2d 648, 651-52 N.2 (2nd Cir. 1982); Duquesne Light Company v. EPA, 698 F.2d 456 (D.C. Cir. 1983); American Cyanamid v. U.S. Environmental Protection Agency, 810 F.2d 493, 495 (5th Cir. 1987); United States v. General Motors Corporation, 876 F.2d 1060, 1066 (1st

Cir. 1989); United States v. Alcan Oil Products, 889 F.2d 1513 (6th Cir. 1989).[1]

III. THE FIRST CIRCUIT'S PROPOSED REMEDY FOR EPA INACTION IS UNWORKABLE.

The First Circuit in rejecting the enforcement bar adopted by the Fifth Circuit in American Cyanamid attempted to steer what it termed a "middle course between the two extremes, attempting to permit trial courts

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[1] At one time it appeared that the Sixth Circuit may not have required EPA compliance with the four (4) month rule. See United States v. National Steel Corporation, 767 F.2d 1176, 1182-1183 N.1 (6th Cir. 1985). The Sixth Circuit rejected this earlier dicta in its recent Alcan decision. Amicus hereby incorporates by reference the arguments made by Petitioner on this point. Suffice it to say that if the Court should reverse the decision below and hold that the four (4) month limitation does not apply to EPA review of SIP revisions, we would truly be in a situation where the tail, in this case EPA, was truly wagging the dog, the States.

to take account of the circumstances of each case and hopefully accommodate both the State's needs and the public's desire for clean air." U.S. v. General Motors Corporation, 876 F.2d 1060 at 1067. The First Circuit suggested two possible remedies for EPA inaction. The first was for the affected company to bring a citizen's suit pursuant to 42 U.S.C. §7604(a)(2) in order to compel agency action. Id. The second remedy it proposed was for the District Court to consider "the reasonableness of the agency's delay and the prejudice, if any, suffered by the company as a result." Id. We discuss the problems with each of these remedies separately.

A. The Citizen's Suit Remedy.

In order to assess the possible efficiency of the "citizen's suit" remedy proposed by the First Circuit, it is

necessary to examine the statutory language authorizing such suits which is found at 42 U.S.C. §7604.

Specifically, §7604(a)(2) allows any person to commence a civil suit on his behalf against the Administrator where there is a failure of the Administrator to perform an act or duty which is non-discretionary under the Act. §7604(b)(2) provides that no such action may be maintained unless the proposed Plaintiff has given the Administrator sixty (60) days notice of such proposed action.

This notice in turn cannot be provided until the statutory period within which the Administrator may act has run out, in the case of a proposed SIP revision, one hundred twenty (120) days.

Thus, a major stationary source must put itself at risk of a fine of up to One Million Five Hundred Thousand and 00/100

($1,500,000.00) Dollars before it could even begin to avail itself of the remedy proposed by the First Circuit.

Not only must such a source risk such potential exposure, the infliction of litigation costs alone may well be more than such source may bear. This is particularly true of relatively small "major sources."

Amicus can scarcely believe that Congress intended for those sources making good faith, best efforts to reduce pollution, would be forced to squander their resources on actions to compel the administrator to perform non-discretionary duties, when their limited resources would be better spent on pollution abatement. This is particularly true in the case of relatively small businesses.

It should be noted that both the Sixth Circuit in Alcan, as well as the D.C. Circuit

in Duquesne Light, both took the view that the "citizen's suit" remedy adopted herein by the First Circuit would simply not be an effective remedy for EPA inaction. SSDA fully agrees with the Sixth and D.C. Circuits and strongly urges the Court to reject the idea that a citizen's suit is an effective remedy for agency inaction in the present context.

B. Reductions In Potential Penalties Is Also Not An Appropriate Remedy For The Administrator's Inaction.

In reaching its holding that District Courts should consider the reasonableness of the Agency's delay and the prejudice, if any, to a company by the Agency's inaction in determining what penalties should be imposed under the Act, the First Circuit did not accurately quote §113 (42 U.S.C. §7413) of the Clean Air Act.

Specifically, the First Circuit quoted that section of the Act as expressly allowing courts to "take into consideration the size of the business, economic impact of the penalty on the business and the seriousness of the violation in determining an appropriate penalty." 876 F.2d at 1068.

The distinction between the factors enumerated by the statute and the proposed remedy of the First Circuit is that the factors listed by the statute are mandatory, that is, §113(b) of the Act states that District Courts "shall take into consideration the size of the business, the economic impact of the penalty on the business and the seriousness of the violation."

On the other hand, the balancing test proposed by the First Circuit would be purely discretionary with the trial court. Thus, a

trial court would have no duty to reduce the penalties, and even if it did exercise its discretion to reduce such penalties, the penalties would surely be greater than that which a small business, such as those represented by SSDA members, could absorb.

In sum, the hope that a District Court may reduce a penalty due to EPA inaction, is not something that any rational businessman would risk both his livelihood and those of his or her employees over. It is not a workable remedy and the Court should reject it.

IV. ONLY THE ENFORCEMENT BAR AS ADOPTED BY THE FIFTH CIRCUIT IN AMERICAN CYANAMID PROPERLY PRESERVES THE ROLE OF THE STATES AND IS FAITHFUL TO THE PURPOSES OF THE ACT

The SSDA strongly urges the Court to adopt the position taken by the Fifth Circuit in American Cyanamid and require EPA to

either accept or reject a SIP revision before it may bring an enforcement action against the company that is in compliance with such State authorized revisions. SSDA can add little to the cogent arguments already made by Petitioner and the other amici in this regard.

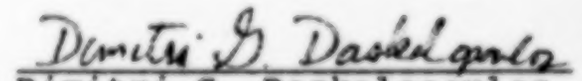
However, we would point out that there are similarities in this situation to other areas of the law. For example, under the antitrust laws, a party which takes actions which may be anti-competitive, yet are compelled by the State, are shielded from antitrust liability by virtue of the state action Doctrine. This was reaffirmed as recently as this Court's 1985 decision in the Southern Motor Carriers case. Similarly, it seems most inequitable to subject a company that acts pursuant to State authorization by virtue of a SIP revision under the Clean Air

Act to be subject to penalties. It would be similar to allowing the Department of Justice to unilaterally define substantive antitrust offenses for which a party, acting under State compulsion, could be held liable. We thus strongly urge adoption of the Fifth Circuit rule.

CONCLUSION

The judgment of the First Circuit should be affirmed as to the issue of whether the four (4) month rule applies to EPA approval of proposed SIP revisions. The judgment should be reversed as to the issue of the appropriate remedy for the agency inaction upon such SIP revision.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 1990, I mailed, first class mail, postage prepaid, three (3) copies of this Brief Amicus Curiae to: Theodore L. Garrett, Covington and Burling, 1201 Pennsylvania Avenue, N.W., P. O. Box 7566, Washington, D.C., 20044 (Counsel of Record for Petitioner, General Motors Corporation), and to: Kenneth W. Starr, Solicitor General, U.S. Department of Justice, Washington, D.C., 20530 (Counsel of Record for Respondent, United States of America). I further certifiy that all parties required to be served have been served.

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BRIEF FOR THE COMMONWEALTHS OF MASSACHUSETTS AND VIRGINIA AND THE STATES OF CALIFORNIA, CONNECTICUT, IDAHO, ILLINOIS, KANSAS, MICHIGAN, MINNESOTA, NEW YORK, NORTH CAROLINA, VERMONT, AND WASHINGTON AS AMICI CURIAE URGING AFFIRMANCE

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ISSUE PRESENTED

Whether Federal Enforcement of the Existing Provisions of a Clean Air Act State Implementation Plan Is Barred Pending Completion of the United States Environmental Protection Agency's Review of a Proposed Revision to the Plan?

TABLE OF CONTENTS

ISSUE PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTERESTS OF AMICI STATES 1

SUMMARY OF ARGUMENT 11

ARGUMENT

FEDERAL ENFORCEMENT OF THE EXISTING SIP PROVISIONS IS NOT BARRED PENDING COMPLETION OF EPA REVIEW OF A PROPOSED REVISION 12

I. Until EPA Rules on a SIP Revision, the Existing SIP Remains In Effect 12

II. EPA's Failure to Review SIP Revisions In a Timely Manner Does Not Create A Bar to Federal Enforcement of the Existing SIP 16

A. The Clean Air Act Mandates Federal Enforcement of Existing SIP Provisions . 16

B. The Proposed Enforcement Bar Contravenes the Language and Intent of the Clean Air Act, As Well As General Principles Against Forefeiture of the Public Interest 18

C. The Proposed Enforcement Bar Will Not Prompt EPA Action Beyond the Available Mandamus Remedy 25

III. Any Unfairness to General Motors Caused By EPA's Delay Can Be Remedied Without An Enforcement Bar 29

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

American Cyanamid Co. v. EPA, 810 F.2d 493, 495 (5th Cir. 1987) 4, 13

Brock v. Pierce County, 476 U.S. 253, 259 (1986) 19-22, 24

Council of Commuter Organizations v. Thomas, 799 F.2d 879, 888 (2d Cir. 1986) 4, 21

Duquesne Light Co. v. EPA, 698 F.2d 456, 471 (D.C. Cir. 1983) . . 4, 9, 17, 32

Massachusetts v. Reilly, C.A. No. 89-0403-T (D. Mass.) 26

Northern Cheyenne Tribe v. Hodel, 842 F.2d 224, 229 (9th Cir. 1988). . . 26

St. Regis Mohawk Tribe, New York v. Brock, 769 F.2d 37, 41 (2d Cir. 1985), cert. denied, 476 U.S. 1140 (1986) 19

Train v. Natural Resources Defense Council, 421 U.S. 60 (1975) 2, 3, 13, 33

United States v. Alcan Foil Products, 889 F.2d 1513 (6th Cir. 1989) 4

United States v. Ford Motor Co., 814 F.2d 1099, 1102 (6th Cir. 1987) . . 8, 9, 13, 14, 15

United States v. General Motors, 876 F.2d 1060 (1st Cir. 1989) (opinion below) . . 3, 15, 22, 25, 30

United States v. Nashville, C. & St. L. R. Co., 118 U.S. 120, 125 (1886) . 20

United States v. Ven-Fuel, Inc., 758 F. 2d 763-64 (1st Cir. 1985) 30

Walker v. City of Birmingham, 388 U.S. 307, 320-21 (1967) 32

STATUTES

33 U.S.C. §§ 1251 et seq. 24

42 U.S.C. § 7407 1

42 U.S.C. § 7409 2

42 U.S.C. § 7410 2

42 U.S.C. § 7410(a) 2, 3, 13

42 U.S.C. § 7410(c) 13

42 U.S.C. § 7410(d) 13

42 U.S.C. § 7410(g) 15, 22

42 U.S.C. § 7413 13

42 U.S.C. § 7413(a)(1) 17

42 U.S.C. § 7413(b) 17

42 U.S.C. § 7413(c)(1) 18

42 U.S.C. § 7604 . . . . . 21, 24

REGULATIONS

40 C.F.R. § 50.8(a)(2) 23

OTHER SOURCES

54 Fed. Reg. 19173 (May 4, 1989) . . . 27

S. Rep. No. 91-1196, 91st Cong., 2d Sess. 10 (1970) 23

INTERESTS OF AMICI STATES

The states that have joined in this brief, like all states, have a fundamental interest in protecting the health and welfare of their citizens. One of the most important ways that states pursue this interest is through preventing air pollution. Moreover, under the Clean Air Act, states have "the primary responsibility for assuring air quality" within their respective borders. 42 U.S.C. § 7407. The fundamental interest that states share in protecting their citizens from air pollution would be served by affirmance of the opinion below.

The Clean Air Act is administered jointly by the states and the United States Environmental Protection Agency (EPA). Particular roles are assigned to each. EPA is required to set national ambient air quality standards (NAAQS) for

designated pollutants. 42 U.S.C. § 7409. Each state is then required to develop and administer state implementation plans (SIPs) setting forth the strategy the state will use to bring its air quality into compliance with the NAAQS and to maintain such compliance thereafter. 42 U.S.C. § 7410.

States must submit their SIPs to EPA for review and approval. 42 U.S.C. § 7410(a)(1). Any proposed revisions to an approved SIP are also subject to EPA approval. 42 U.S.C. § 7410(a)(3). Only after such approval is a SIP or SIP revision effective under the Clean Air Act. Train v. Natural Resources Defense Council ("Train"), 421 U.S. 60, 92 (1975).

EPA must approve a SIP submittal when the agency determines that the submittal would result in timely attainment of the NAAQS and that it otherwise complies with a specified set of statutory

requirements. See 42 U.S.C. §§ 7410(a)(2), 7410(a)(3)(A). EPA may not substitute its judgment for that of the states regarding the particular mix of emissions limitations appropriate for achieving compliance with the NAAQS. Train, supra, 421 U.S. at 79.

Because SIP revisions are effective under the Clean Air Act only after EPA's approval, the role of the states as the primary policy-makers will be preserved only with prompt EPA review. States therefore have a strong interest in ensuring expeditious review of their SIP revisions. The statute addresses this interest by requiring EPA to act on SIP revisions within four months.1/

1/ The Court of Appeals for the First Circuit properly recognized that EPA has a nondiscretionary duty to act on SIP revisions within four months. 876 F.2d at 1066. For the reasons set forth in

(footnote continued)

Where a SIP revision would relax an emissions limitation and where EPA has not acted upon the SIP revision within four months, Petitioner General Motors Corporation ("General Motors") argues that federal enforcement should be barred against a person who is in compliance with the proposed revision until EPA denies the revision. See Brief of Petitioner General Motors Corporation ("Petitioner's Brief") at pp. 20-24.

(footnote continued)

the Brief of Petitioner General Motors Corporation at p. 12, n. 13, the correctness of that ruling is not before this Court. In any event, for the reasons set forth at pp. 13-14 of the petitioner's brief, the ruling is certainly correct. All other circuits that have addressed this issue have come to the same conclusion. See Council of Commuter Organizations v. Thomas, 799 F.2d 879, 888 (2d Cir. 1986); American Cyanamid Co. v. EPA, 810 F.2d 493, 495 (5th Cir. 1987); United States v. Alcan Foil Products, 889 F.2d 1513, 1517-18 (6th Cir. 1989); Duquesne Light Co. v. EPA, 698 F.2d 456, 471 (D.C. Cir. 1983).

General Motors contends that such an enforcement bar is the only appropriate and meaningful remedy for EPA delay. This contention is based primarily on General Motors' assessment of the states' interests. See e.g., Petitioner's Brief at p. 22 (arguing that enforcement bar follows from state interests, not from unfairness to industry). For the reasons set forth below, amici states disagree with petitioner's assessment. The states submit this brief so that they, and not General Motors, may set forth what is in their interest.[2/]

The enforcement bar that General Motors proposes would have the effect of allowing a state's proposed SIP revision

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2/ In concurring with EPA that the agency's delay should not work an enforcement bar, the amici states do not mean to condone EPA's delay or to minimize the problems that such delay causes the states.

to go into effect without EPA approval. While states, of course, have an interest in seeing that their SIP revisions are federally approved, it does not follow that states also have an interest in allowing such revisions to go into effect without EPA's approval. EPA's review and approval directly benefits a state by ensuring that relaxation of a particular emission limitation will not prevent the state from coming into compliance with the NAAQS.[3/]

3/ The differences in the roles assigned to the states and to EPA are very important for some purposes, but they should not be overstated. Ultimately, the Clean Air Act charges both the states and EPA with the same goal: reducing air pollution so as to achieve compliance with the NAAQS. While there will inevitably be tensions between the states and EPA as to how to achieve the goal of clean air, the state and federal agencies should, and generally do, attempt to work together with mutual respect and appreciation for the legitimate role of

(footnote continued)

Moreover, a state proposing a revision and EPA share a strong interest in maintaining respect for compliance with the Clean Air Act. The proposed enforcement bar would undercut this interest by condoning knowing violations of federal law.[4/] For this reason, states have an interest in preserving the enforceability of existing SIP provisions even where they have sought to revise those provisions.

(footnote continued)

the other. This relationship has been reflected in the controversy at hand. While Massachusetts and EPA have a reasonable difference of opinion regarding approval of the particular SIP revision at issue, the relationship between them has been one of respect.

4/ As discussed below in Part I of the Argument, the existing SIP provisions remain the federal standard with which industry must comply.

Any proper analysis of state interests must consider not only the interests of the state proposing the SIP revision, but the interests of other states as well. Air pollution ignores state boundaries. As a result, states that are downwind of a state seeking to relax an emissions limitation have an important stake in strong EPA oversight of the proposed revision. For the same reason, downwind states also have a strong interest in preserving the enforceability of the existing SIP provisions pending completion of EPA review.

Furthermore, states compete for industry. This creates economic pressure for states to reduce the level of air pollution regulation in order to attract or to keep "smoke stack industries." EPA oversight helps police this interstate competition. See e.g., United States v.

Ford Motor Co., 814 F.2d 1099, 1102 (6th Cir. 1987)(without federal oversight, "major shifts of smoke stack industries to states with the most lenient pure air standards would inevitably take place").[5/] Therefore, even states that are upwind of the state seeking to revise its SIP have an interest in increased federal supervision, not less. For the same reason, upwind states also have an interest in the continued enforceability of the existing SIP while the proposed revision is under

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5/ See also Duquesne v. EPA, supra, 698 F.2d at 471 (recognizing EPA's role "to ensure national uniformity where needed, for example, to ensure that states do not compete unfairly for industry by offering air quality standards that are too lax to bring about needed improvements in the air we breath").

review.[6/]

In sum, states have a strong interest in EPA acting promptly, but it does not follow that the enforcement bar proposed by General Motors is also in their interest. States have an independent interest in preserving the enforceability of an existing SIP while a proposed revision is under EPA review. This interest would be directly undercut by General Motors proposed remedy. The amici states therefore ask this court to decline General Motors' invitation to create the proposed enforcement bar and instead to affirm the decision of the Court of Appeals for the First Circuit.

6/ A state prevented from putting its SIP revision into effect without EPA approval achieves a reciprocity of benefit from the fact that other states find themselves in the same position. What states gain from this arrangement overcomes any special interest states have in seeing SIP revisions go into effect without EPA approval.

SUMMARY OF ARGUMENT

Under the plain language of the Clean Air Act, there can be no doubt that an existing SIP remains in effect until EPA approves a proposed revision. In the interim, EPA delay in reviewing the proposed revision should bar the agency from enforcing the existing SIP only if Congress clearly intended such a result. The language and intent of the statute demonstrate that an enforcement bar was not intended. This is further evidenced by the fact that the statute itself sets forth a less drastic remedy for EPA inaction.

The enforcement bar requested by General Motors is not only unfounded, it would not serve the purpose for which General Motors claims it was intended. To the extent that the available mandamus remedy would be ineffective in inducing

EPA action, an enforcement bar would also be ineffective.

General Motors, and any other polluter similarly situated, will have every opportunity to argue to the District Court why EPA's actions should diminish the amount of any penalty owed. A per se rule against the imposition of penalties is unnecessary and inappropriate.

ARGUMENT

FEDERAL ENFORCEMENT OF THE EXISTING SIP PROVISIONS IS NOT BARRED PENDING COMPLETION OF EPA REVIEW OF A PROPOSED REVISION.

I. Until EPA Rules on a SIP Revision, the Existing SIP Remains In Effect.

The language of the Clean Air Act makes clear that until a proposed revision has been finally approved by EPA, the existing SIP continues to be the federal standard with which industry must

comply.[7] This Court has explicitly recognized this principle. See Train v. Natural Resources Defense Council, 421 U.S. 60, 92 (1975)(polluter subject to the requirements of an existing SIP until a SIP revision has been approved by both the state and EPA). Other federal courts have unanimously come to the same conclusion.[8] See e.g., U.S. v.

7/ Failure to comply with an "applicable implementation plan" is a violation of federal law. 42 U.S.C. § 7413. The "applicable implementation plan," is "the implementation plan, or most recent revision thereof, which has been approved [in accordance with the statutorily mandated procedures]." 42 U.S.C. § 7410(d). These procedures include approval by both the applicable state and EPA, except in limited circumstances where EPA itself is authorized to promulgate a SIP in place of a state. 42 U.S.C. §§ 7410(a), 7410(c).

8/ American Cyanamid Co. v. EPA, supra, 810 F.2d at 499-50 and the District Court opinion in the case at hand are not to the contrary. Those opinions held that

(footnote continued)

Ford Motor Co., supra, 814 F. 2d at 1102 (noting "overwhelming authority declaring that revisions of State Implementation Plans are ineffective until approved by EPA").

The principle that a SIP revision is not effective until approved by EPA accords with the role assigned to EPA by the Clean Air Act. While this role may be limited, it is also critically important. The statute gives EPA the primary role in determining whether the revised SIP will result in timely attainment of the NAAQS. Accordingly,

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(footnote continued)

there were limitations on EPA's enforcing the existing SIP, but they did not hold that this SIP was no longer in effect. In any event, for the reasons set forth in Part II, below, these opinions were wrongly decided.

the statute also recognizes that a proposed SIP revision goes into effect only after EPA determines that the revision will not jeopardize such attainment.9/

Faced with the unambiguous language of the statute and with Train and similar case law, General Motors has not even attempted to argue that a SIP revision

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9/ The statute includes one exception to this general rule. Under certain circumstances where EPA has failed to act on a SIP revision within four months of its submittal, a governor may issue an emergency suspension of the existing SIP in order to keep a plant open, subject to EPA override. 42 U.S.C. § 7410(g). The existence of this explicit exception demonstrates that in all other circumstances, the provisions of the existing SIP remain in effect. As recognized by the First Circuit in the opinion below, the emergency suspension provision evinces a statutory intent that exisiting SIP provisions remain valid and enforceable notwithstanding EPA delay in reviewing any proposed revision. See 876 F.2d at 1069, n. 6.

The emergency suspension provision was not used in the case at hand.

could be effective without EPA approval. Nevertheless, General Motors attempts to achieve exactly the same result through arguing that the existing SIP provisions, while effective, are unenforceable. Through this "sleight of hand," General Motors attempts to make the language of the statute disappear. For the reasons set forth below, the Court should reject this attempt.

II. EPA's Failure to Review SIP Revisions In a Timely Manner Does Not Create A Bar to Federal Enforcement of the Existing SIP.

A. The Clean Air Act Mandates Federal Enforcement of Existing SIP Provisions.

One of the most important changes brought about by the 1970 Amendments to the Clean Air Act was its assigning to EPA a role in enforcing SIPs. This role was greatly strengthened by the 1977

Amendments to the act.[10/] The statute now not only authorizes EPA to enforce applicable SIPs, it compels the agency to do so. See e.g., 42 U.S.C. §§ 7413(a)(1), 7413(b).[11/] There is no language anywhere in the statute that conditions EPA's enforcement mandate on its duty to comply with the four month review deadline.

The statute also mandates that all knowing violations of an existing SIP be

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10/ The 1970 Amendments authorized EPA to issue administrative orders and to seek injunctive relief. See Duquesne v. EPA, supra, 698 F.2d at 463. The 1977 Amendments expanded this power by authorizing the agency to seek civil penalties and to assess administrative penalties. Id.

11/ The statute requires the EPA Administrator to notify persons violating an applicable SIP of their noncompliance. 42 U.S.C. § 7413(a)(1). Where, as here, the violations continue and the polluter is a "major stationary source," the EPA Administrator is required to bring a civil action to enforce the SIP. 42 U.S.C. § 7413(b).

subject to punishment. Pursuant to 42 U.S.C. § 7413(c)(1):

> [a]ny person who knowingly . . . violates any requirement of an applicable implementation plan. . . shall be punished by [listed sanctions including penalties and imprisonment]. [emphasis added].

Here again, the statutory mandate is not in any way connected to, much less conditioned on, the timeliness of EPA review.

B. The Proposed Enforcement Bar Contravenes the Language and Intent of the Clean Air Act, As Well As General Principles Against Forefeiture of the Public Interest.

As discussed above, neither the mandate that EPA enforce the provisions of an existing SIP, nor the mandate that knowing violations of those provisions be subject to punishment, is conditioned on timely EPA review of a proposed revision. In the absence of such language, no such intent should be

inferred. See St. Regis Mohawk Tribe, New York v. Brock, 769 F.2d 37, 41 (2d Cir. 1985), cert. denied, 476 U.S. 1140 (1986)(government does not lose jurisdiction over regulated activity for failure to act within a particular time frame unless the statute "both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision")(cited in Brock v. Pierce County ("Brock"), 476 U.S. 253, 259 (1986)).

In Brock, this Court left open the possibility that a bar against government enforcement could be found without explicit language to that effect. Brock made clear, however, that such a bar should not be found absent a showing of congressional intent through indicia other than the plain language of the

statute. This flows from the

> great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided.

Brock at 260 (quoting United States v. Nashville, C. & St. L. R. Co., 118 U.S. 120, 125 (1886)).

Far from evincing an intent to bar EPA enforcement, the Clean Air Act demonstrates an intent to compel enforcement. The statute unquestionably mandates that existing SIP provisions remain in effect until proposed revisions are approved by both the state and EPA, and further mandates that knowing violations of those provisions be punished. The suggested enforcement bar would directly contravene this intent by allowing proposed SIP revisions to be effective de facto without EPA approval.

Moreover, another aspect of the Clean Air Act demonstrates that Congress did not intend an enforcement bar. This Court has stated that it will not infer congressional intent to bar governmental enforcement because of agency delay where "there are less drastic remedies available for failure to meet a statutory deadline." Brock, supra, 476 U.S. at 260. Section 304 of the Clean Air Act authorizes aggrieved parties to bring a mandamus action to require EPA to comply with non-discretionary duties, such as its duty to meet statutorily-mandated deadlines. 42 U.S.C. § 7604(a)(2). See e.g., Council of Commuter Organizations v. Thomas, supra, 799 F.2d. at 888 (section 304 provides the remedy for undue delay in EPA's reviewing SIP revisions). The statute thus explicitly provides a remedy for EPA tardiness. Given the availability of this remedy,

courts should not infer a congressional intent to bar EPA enforcement. Brock, supra, at 260.[12/]

General Motors attempts to distinguish Brock and similar cases on the grounds that in those cases, the question was whether the agency permanently lost jurisdiction by its failure to act. See Petitioner's Brief at p. 26. Here, General Motors argues, the issue is "only" whether EPA is temporarily barred from enforcing the SIP until it acts on the revision. Id. This distinction makes no difference. For the period of EPA tardiness, any air pollution that would be allowed under the SIP revision could result in permanent harm that would not be undone by subsequent EPA action.[13/] From

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12/ Congress in fact provided an additional remedy for EPA inaction. As discussed in note 9, supra, the Clean Air Act includes an emergency suspension provision that authorizes a governor to suspend the terms of an existing SIP in limited circumstances, subject to EPA override, in order to keep a plant open. Under the plain language of the statute, a governor can invoke the emergency suspension provision only after the four month deadline for EPA review has run. See 42 U.S.C. § 7410(g). This demonstrates that Congress specifically contemplated that EPA would at times fail to meet the four month deadline and that Congress intended the existing SIP to remain in full force and effect unless an emergency suspension was issued. The Court of Appeals below recognized that General Motors' suggested enforcement bar would render the emergency suspension provision superfluous. 876 F.2d at 1069, n.6.

13/ The consequences of temporary violations should not be underestimated. The NAAQS are health-based standards designed to protect the most vulnerable members of society. See S. Rep. No. 91-1196, 91st Cong., 2d Sess. 10 (1970)(setting forth a clear intent that the most sensitive individuals be protected). The standards are so important that compliance with them must, for some purposes, be measured on an hourly basis. See e.g., 40 C.F.R. § 50.8(a)(2)(national primary ambient air quality standard for carbon monoxide set forth as a one hour average concentration not to be exceeded more than once per year).

the standpoint of potential harm to the public health during the interim period, therefore, it makes no difference whether the enforcement ban is temporary or permanent. The principles in Brock turn on whether the public interest would be forfeited, not the duration of the forfeiture. These principles dictate that EPA not be barred from enforcing the existing SIP.[14/]

14/ It is not a sufficient answer to note that "citizens" (including downwind states) could sue to enforce the existing SIP provisions even if EPA itself were barred. See 42 U.S.C. § 7604 (citizen suits). Citizen enforcement was intended to supplement EPA enforcement, not to supplant it. This is especially so given that there are substantial "transaction costs" that deter citizen enforcement. Unlike the Clean Water Act, 33 U.S.C. §§ 1251 et seq., the Clean Air Act has no general permit and self-monitoring scheme that would make it readily amenable to citizen enforcement.

C. The Proposed Enforcement Bar Will Not Prompt EPA Action Beyond the Available Mandamus Remedy.

General Motors argues that EPA will have an adequate incentive to act quickly on SIP revisions only if the agency faces an enforcement bar if it does not so act. See Petitioner's Brief, at p. 32. For the reasons discussed below, this argument fails. The remedy that General Motors proposes is therefore not only unfounded, it would not even serve the purpose for which the petitioner claims it was intended.

It is important to keep in mind that under the First Circuit's formulation, EPA will still face the "threat" that its delay will diminish its claim for penalties. See 876 F.2d at 1068-69. Adopting an enforcement bar would simply transform the risk of such a consequence

into a certainty. The incremental effect of this change on EPA's actions is likely to be minimal.[15/]

Where EPA delay is caused by factors within the agency's control, mandamus should be an effective remedy.[16/]

15/ General Motors' asserts that without an enforcement bar, EPA has an affirmative incentive to delay review of SIP revisions in order to build an enforcement case. This fear is unfounded on the current record and it is contrary to the presumption that public officials will act in compliance with the law. See e.g., Northern Cheyenne Tribe v. Hodel, 842 F.2d 224, 229 (9th Cir. 1988). Moreover, any incentive to act in such a manner is removed by the First Circuit's recognition that these actions would diminish EPA's claim for penalties.

16/ Recently, Massachusetts successfully used a § 304 suit to compel EPA action on a SIP revision. Massachusetts v. Reilly, C.A. No. 89-0403-T (D. Mass.). In July

(footnote continued)

Indeed, it is difficult to imagine a more effective remedy than threatened contempt-of-court sanctions. General Motors' "scare story" of protracted mandamus litigation is undercut by the inherent simplicity of the mandamus cause of action.[17/]

(footnote continued)

of 1988, Massachusetts submitted to EPA a proposed SIP revision regarding gasoline volatility. The proposed revision was to be effective as of May 13, 1989. When EPA delayed ruling on the revision, Massachusetts brought its mandamus suit in February of 1989 and promptly filed a Motion for Summary Judgment the following month. EPA approved the revision in April, prior to the hearing of Massachusetts' motion. See 54 Fed. Reg. 19173 (May 4, 1989).

17/ Because EPA has a nondiscretionary duty to act on SIP submittals within four months, in order to succeed in a mandamus suit, a plaintiff would merely have to prove that a SIP revision had been submitted, that more than four months had passed, and that EPA had not yet acted.

Mandamus suits do not provide an effective remedy where agency delay is caused by factors outside of the agency's control. In such instances, however, an enforcement bar would do nothing to speed the process. In other words, where mandamus suits would be ineffective, an enforcement bar would also be ineffective. Thus, the enforcement bar proposed by General Motors would not further the state interest in prompt EPA review beyond the remedy already provided. It would serve only to threaten the public interest in enforcing the existing SIP in circumstances where the delay was caused by factors beyond the agency's control.[18/]

18/ The enforcement bar might in fact delay, not prompt, EPA review. Without an enforcement bar, affected companies will be induced to keep pressure on EPA to act quickly. With such a bar, this incentive is removed.

III. Any Unfairness to General Motors Caused By EPA's Delay Can Be Remedied Without An Enforcement Bar.

Given the plain language of the statute, General Motors must have known that the existing SIP provisions remained in effect until EPA approved the revision. Yet, the company declined to pursue the mandamus remedy that was available to it. Instead, General Motors knowingly chose to violate the existing SIP provisions and thereby to assume the risk of federal enforcement.[19/]

19/ Under the undisputed facts, General Motors violated the terms of the existing SIP even during the four month period given to EPA to review the proposed revision. Joint Appendix at 19, 79. General Motors does not and cannot argue that the public interest would have been served by an enforcement bar during this period.

This is not to say that EPA's tardiness is irrelevant to the District Court's assessment of any penalties. General Motors has presented a number of case-specific factors, of varying degrees of merit, that argue for a reduction of the amount of penalties to be assessed. Under the First Circuit's opinion, however, General Motors will have every opportunity to raise these factors in District Court and to argue that the Court, in its discretion, should reduce the penalty accordingly. See 876 F.2d at 1068-69. See generally, United States v. Ven-Fuel, Inc., 758 F. 2d 763-64 (1st Cir. 1985)(always within the discretion of the trial court to determine whether penalties, given facts of a particular case, are warranted).

General Motors is dissatisfied with leaving the setting of the penalty to the discretion of the District Court. Instead, it argues for an enforcement bar under which, the day the four month period elapses without EPA decision, a polluter would be free to begin violating the existing SIP without fear of any penalty. There is no language in the statute that supports General Motors' understandable desire to escape even the possibility of penalties. To the contrary, as discussed above, the statute explicitly mandates that knowing violations of any provision of the existing SIP be subject to punishment. A per se rule precluding penalties against companies that knowingly violate existing SIP provisions would mock governmental enforcement efforts and diminish the regulated community's respect for

compliance with the act.[20/]

Clearly there will be circumstances where a company in compliance with a proposed SIP revision should be penalized for violating the terms of the existing SIP. This would be the case, for example, where the polluter had reason to

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20/ This follows regardless of the underlying merits of the proposed SIP revision. That is, even where EPA eventually approved a SIP revision, a company should not be shielded from penalties for violating existing law in the interim period. Under analogous circumstances, courts have long held that court orders must be obeyed even where the order was improperly issued. See e.g., Walker v. City of Birmingham, 388 U.S. 307, 320-21 (1967)(parties who knowingly violate a court order may not challenge the underlying validity of the order in contempt of court proceeding). Accordingly, there should be no per se rule against the imposition of penalties even where the proposed SIP provision was "approvable." To this extent, Duquesne Light Co. v. EPA, supra, 698 F.2d at 472, was wrongly decided.

doubt that the SIP provision would be approved.[21/] In the case at hand, General Motors continued to violate the existing SIP after it had been informed that EPA had made a preliminary determination to deny the proposed revision. Joint Appendix at 19, 91-96.

Whether or not penalties were assessed in particular circumstances, the threat of penalties is essential to governmental enforcement efforts. General Motors' proposed enforcement bar

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21/ Another circumstance that can arise is where the SIP revision is ultimately and untimely denied, but where the result could not have been predicted either way. The question would then become whether the uncertainty should benefit the public (through allowing enforcement actions to ensure compliance with the existing SIP) or industry (through an enforcement bar until denial of the revision). Given the purposes of the Clean Air Act, the uncertainty should be resolved in favor of the public. Cf. Train, supra, 421 U.S. at 92 (appeal of denial of SIP revision "carried out on the polluter's time, not the public's").

would shield one who knowingly violated federal law from facing even the threat of penalties. This proposed rule is unnecessary and inappropriate, and the Court should decline to adopt it.

CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the United States Court of Appeals for the First Circuit.

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No. 89-369

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

GENERAL MOTORS CORPORATION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Supreme Court on appeal from the First Circuit, United States Court of Appeals

Brief of Mid-America Legal Foundation as Amicus Curiae supporting the position of petitioner

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.	2
INTEREST OF AMICUS CURIAE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	5
CONCLUSION.	8

TABLE OF AUTHORITIES

CASES:

U.S. v. General Motors Corp., 876 F. 2d 1060 (1st Circuit, 1989)

American Cyanamid Co. v. EPA, 810 F. 2d 493 (5th Cir. 1987)

STATUTES:

Clean Air Act, 42 USCA § 7410 (a) (3) (A)

INTEREST OF AMICUS CURIAE

Mid-America Legal Foundation ("MALF") is a non-profit Illinois corporation. MALF has an interest in the disposition of the case which is before this Court on writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit in United States vs. General Motors, 876 F. 2d 1060 (1989, 1st Circuit), based on the expertise and purpose of this organization.

MALF was organized in 1975 to engage in legal research, study and advocacy for the benefit of the general public. MALF takes special interest in issues of national scope that have a direct impact on the Midwest region, namely Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin.

The Midwest region is one of the most important manufacturing areas of the nation. Many of the states in the Midwest

are within the purview of the USEPA Region 5, which had 83 "Source Specific" SIP (State Implementation Plan) variances awaiting Agency approval or disapproval as of the end of 1989. The issues before the Court have direct application to the industries and states in the Midwest.

SUMMARY OF ARGUMENT

The USEPA cannot claim it lacks resources to comply with the statutory four month deadline for deciding a SIP variance, where it has sufficient staffing to bring an enforcement action against that same regulated entity.

ARGUMENT

First of all, this court should affirm the ruling of the First Circuit holding that the four-month rule applies equally to SIP revisions as to original SIP's. Clean Air Act, 42 USCA § 7410 (a) (3) (A). This is the most logical result, in light of the

statutory scheme which requires swift action by all concerned.

The First Circuit has indicated that the USEPA cannot be expected to act on all SIP variance applications within the four-month time allotment, as it lacks the necessary resources to do so. However the actions of the Agency prove that this is not the reason for its failure to act in a timely manner. This can be seen by the fact that the Agency frequently brings enforcement actions against the very companies which have applications pending for SIP variances.

Certainly an approval or disapproval of a SIP variance takes less effort for the Agency than commencing litigation against the company.

The rule set forth in American Cyanamid Co. v. EPA, 810 F. 2d 493 (5th Cir. 1987) is logical and fair, in that the Agency has within its control the option of

handing down a decision as to the SIP variance. This procedure would provide the company advance knowledge as to its position, and it could then act accordingly.

It is absurd for the Agency to say, on the one hand, that it lacks the resources to hand down a timely decision as to a SIP variance, but meanwhile it has the resources to bring litigation with respect to the same issue which is the subject of the SIP variance.

The First Circuit suggests the trial court may take into consideration the Agency's tardiness as to the SIP variance, in its decision as to the amount of the penalty against a company for its violation of the underlying SIP. But such a plan would lead to a totally unworkable system, in that a regulated industry would have no means of knowing in advance whether its course of conduct was legal within the applicable time frame.

Consider the following hypothetical: The USEPA brings an enforcement action against a company while its requested SIP variance is "pending". The Agency then obtains a judgment and penalties. After that, it grants the SIP variance. The EPA thus obviates the right to obtain the penalties which it already has extracted.

The lack of due process rights to the states and to the regulated industries is unavoidable if the Agency prevails in this matter, and is permitted to bring enforcement actions while SIP variance requests languish far in excess of the four months allowed for decision.

CONCLUSION

The Agency should be granted some deference in its activities promoting a cleaner environment for the next generation. On the other hand, this Court ought not allow needless trampling of due process

rights to the regulated industries, and even to the States which have in good faith approved the SIP variance requests before they are submitted to the USEPA.

The USEPA ought to be compelled to make a decision as to a SIP variance request, or delay enforcement until such decision can be made. Such a practice by the USEPA would protect the environment and the rights of the regulated entities.

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